

**OFFICIAL CODE
OF
GEORGIA
—
ANNOTATED**



VOLUME 29A

Title 41. Nuisances
Title 42. Penal Institutions

2014 Edition

OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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Volume 29A **2014 Edition**

Title 41. Nuisances
Title 42. Penal Institutions

Including Acts of the 2014 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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OFFICE OF SECRETARY OF STATE

**I, Brian P. Kemp, Secretary of State of the
State of Georgia, do hereby certify that**

the statutory portion of the Official Code of Georgia Annotated contained
in this volume is a true and correct copy of such material as enacted by
the General Assembly of Georgia; all as same appear of file and record in
this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
the seal of my office, at the Capitol, in the City of Atlanta, this
23rd day of June, in the year of our Lord Two Thousand and
Fourteen and of the Independence of the United States of
America the Two Hundred and Thirty-Eighth.

B. P. Kemp

Brian P. Kemp, Secretary of State



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Preface

This volume cumulates and replaces the 1997 edition of Volume 29A of the Official Code of Georgia Annotated, as supplemented by the 2013 Cumulative Supplement. The 1997 Volume 29A and its 2013 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Titles 41 and 42 by the General Assembly through the 2014 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through March 21, 2014. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2012, 2013, and 2014 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2012 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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TITLE 41

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CHAPTER 1

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41-1-1. Nuisance defined generally.

A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man. (Orig. Code 1863, § 2942; Code 1868, § 2949; Code 1873, § 3000; Code 1882, § 3000; Civil Code 1895, § 3861; Civil Code 1910, § 4457; Code 1933, § 72-101.)

Cross references. — Causes of action and remedies for injuries to real estate, T. 51, C. 9.

Law reviews. — For article, "Recommendations Regarding Control of Outdoor Advertising Along the Interstate Highway System in Georgia," see 14 Mercer L. Rev. 308 (1963). For article discussing Georgia's practice of exposing municipalities to tort liability through the use of nuisance law, see 12 Ga. St. B.J. 11 (1975). For article discussing nuisances as "Hidden Liens," see 14 Ga. St. B.J. 32 (1977). For survey article on real property law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 397 (2003). For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005) and 58 Mercer L. Rev. 477 (2006). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007) and 60 Mercer L. Rev. 457 (2008).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note analyzing sovereign immunity in this state and proposing implementation of a waiver scheme and creation of a court of claims pursuant to Ga. Const. 1976, Art. VI, Sec. V, Para. I, see 27 Emory L.J. 717 (1978).

For comment on *Collins v. Lanier*, 201 Ga. 527, 40 S.E.2d 424 (1946), see 9 Ga. B.J. 325 (1947). For comment on *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947), see 10 Ga. B.J. 372 (1948). For comment on *Bennett v. Bagwell & Stewart*, 214 Ga. 115, 103 S.E.2d 561 (1958), holding that as a nuisance is a continuing trespass, a court in equity will enjoin it in the county of the resident defendant even though he is only an agent or employee of the nonresident defendant, see 21 Ga. B.J. 564 (1959).

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General Consideration

Constitutionality. — Statutory definition of a nuisance is not vague and indefinite and therefore unconstitutional. *Atlanta Processing Co. v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971).

County noise ordinance deemed unconstitutional. — Trial court declared a Effingham County, Georgia noise ordinance to be unconstitutional and the county did not appeal that decision. *Effingham County Bd. of Comm'rs v. Shuler Bros.*, 265 Ga. App. 754, 595 S.E.2d 526 (2004).

Effect on common-law definition. — This section was not intended to change the common-law definition of a nuisance. *State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940).

Effect of Federal Aviation Act of 1958. — Federal Aviation Act of 1958, 49 U.S.C. § 1506, does not abridge or alter remedies existing at common law or by statute, and the provisions of this act are in addition to such remedies. *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338, aff'd, 248 Ga. 299, 282 S.E.2d 906 (1981), cert. denied, 456 U.S. 972, 102 S. Ct. 2235, 72 L. Ed. 2d 846 (1982).

Implied private right of action under federal statute. — If the cause of action is one that is traditionally relegated to state law, such as a nuisance action which is a classic area in which state law controls, under the United States Supreme Court's four-pronged test to be applied in analyzing the propriety of allowing a case to be maintained as an implied private right of action under a federal statute not specifically creating

such a right, it is inappropriate to infer a cause of action based solely on federal law; this is especially true now, since the United States Supreme Court has directed the federal courts to concentrate on the second criterion of the four-pronged test, namely, the question of congressional intent to create or deny a right of recovery under the federal law. *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434 (5th Cir.), cert. denied, 454 U.S. 1126, 102 S. Ct. 977, 71 L. Ed. 2d 114 (1981).

No presumption of legislative intent to authorize nuisance. — It is never to be presumed that the General Assembly intended to authorize a corporation to erect a nuisance materially tending to destroy the life or health of others. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

This section does not legalize a nuisance. *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919); *Cox v. DeJarnette*, 104 Ga. App. 664, 123 S.E.2d 16 (1961).

Indictable nuisances. — Former Civil Code 1910, § 4457 (see now O.C.G.A. § 41-1-1) is not the test of indictable nuisances under former Penal Code 1910, § 681 (see now O.C.G.A. § 41-1-6). *Central of Ga. Power Co. v. State*, 10 Ga. App. 448, 73 S.E. 688 (1912).

Nuisances are anything that cause hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep the act from being a nuisance. A nuisance is permanent if the damage the act causes is complete when the action creating the nuisance first occurs and gives rise to a single cause of action that initiates the

General Consideration (Cont'd)

running of the statute of limitation. On the other hand, a nuisance is not permanent if the act causes continuing damage and is one which can and should be abated by the person erecting or maintaining it. In that case, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie and a fresh statute of limitations begins to run. *Oglethorpe Power Corp. v. Forrister*, 303 Ga. App. 271, 693 S.E.2d 553 (2010).

Right of plaintiff must have been violated. — Act, to constitute a nuisance, must be in violation of some right of the plaintiff. *Sheppard v. Georgia Ry. & Power Co.*, 31 Ga. App. 653, 121 S.E. 868 (1924).

Expression “may otherwise be lawful” shows that the act complained of, insofar as the act causes “hurt, inconvenience, or damage to another” must be unlawful — that is a violation of some right of plaintiff — to constitute a nuisance. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938); *Lawrence v. City of La Grange*, 63 Ga. App. 587, 11 S.E.2d 696 (1940).

Condition causing hurt or inconvenience. — Notion of “illegality” in Georgia involves much more than failure to comply with some particular directives which may or may not apply to an instrumentality at a given time. A condition may be illegal when it is objectionable only on grounds of causing “hurt or inconvenience,” i.e., when it is a nuisance. This conclusion is directly authorized by the statutory definition of nuisance. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff’d*, 667 F.2d 97 (11th Cir. 1982).

Distinction between negligence and nuisance. — In cause of action brought under nuisance exception to municipal immunity, as to a jury’s questions concerning nuisance and the ordinary reasonable man standard found in O.C.G.A. § 41-1-1, the only real distinction between negligence and nuisance would seem to be that the latter involves a continued or repeating condition. One may, of course, dispute whether any negligence was involved in design and maintenance of a traffic signal. But, there would appear

to be no room at all to doubt that the light was a repeating instrumentality. Thus, if there were negligence in design or maintenance, that negligence would of necessity give rise to a nuisance. Certainly a jury was authorized to so find, particularly in light of police officers’ testimony that the light was a known hazard. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff’d*, 667 F.2d 97 (11th Cir. 1982).

Conformity to general law is no defense to nuisance action. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff’d*, 667 F.2d 97 (11th Cir. 1982).

Qualification on use of property. — Fact that the defendant’s predecessor condemned a part of the plaintiff’s land for railroad purposes, and used the part so condemned did not authorize it or its successor in title to maintain a nuisance to the damage of the plaintiff’s other near-by property. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

Right to use one’s property as one pleases implies a like right in every other person, and is qualified by the doctrine that the use in the first instance must be a reasonable one. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

When one acting solely from malevolent motives does injury to one’s neighbor, to call such conduct the exercise of an absolute legal right is a perversion of terms. No statute or other rule of law in this state that confers upon an individual a right to maliciously injure another, regardless of what method may be employed to inflict such injury. On the other hand, everyone is entitled to the protection of the law against invasions of one’s rights by others. The use of one’s own property for the sole purpose of injuring another is not a right that a good citizen would desire nor one that a bad citizen should have. *Hornsby v. Smith*, 191 Ga. 491, 13 S.E.2d 20 (1941).

Nuisance is generally applied to that class of wrongs that arise from the unreasonable, unwarranted, or unlawful use of property. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Restrictive covenant prohibiting “nox-

ious or offensive activity” or anything “which may be or may become an annoyance or nuisance” is too vague, indefinite, and uncertain for enforcement in a court of equity by injunction, except insofar as these words may be included within the definition of a nuisance. *Douglas v. Wages*, 271 Ga. 616, 523 S.E.2d 330 (1999).

Nuisance and trespass distinguished. — Nuisance is an indirect tort, while a trespass usually is a direct infringement of one’s property rights. The distinction between trespass and nuisance consists in the former being a direct infringement of one’s right of property, while in the latter the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from the act. In the one case the injury is immediate, in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected. *Groover v. Hightower*, 59 Ga. App. 491, 1 S.E.2d 446 (1939); *Cannon v. City of Macon*, 81 Ga. App. 310, 58 S.E.2d 563 (1950), later appeal, 89 Ga. App. 484, 79 S.E.2d 816 (1954).

Violation of criminal law not necessarily a nuisance. — Violation of criminal law such as the pursuit of a business on Sunday will not be enjoined on the petition of an individual unless the violation amounts to a nuisance. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

Cited in *Center & Treadwell v. Davis*, 39 Ga. 210 (1869); *Rounsaville v. Kohlheim*, 68 Ga. 668 (1882); *Butler v. Mayor of Thomasville*, 74 Ga. 570 (1885); *Ison v. Manley*, 76 Ga. 804 (1886); *Horton v. Fulton*, 130 Ga. 466, 60 S.E. 1059 (1908); *Williams v. Southern Ry.*, 140 Ga. 713, 79 S.E. 850 (1913); *Tate v. Mull*, 147 Ga. 195, 93 S.E. 212 (1917); *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S.E. 695 (1918); *Pitner v. Shugart Bros.*, 150 Ga. 340, 103 S.E. 791 (1920); *Morrison v. Slappey*, 153 Ga. 724, 113 S.E. 82 (1922); *Town of Rentz v. Roach*, 154 Ga. 491, 115 S.E. 94 (1922); *Harris v. Sutton*, 168 Ga. 565, 148 S.E. 403 (1929); *Jones v. City of Atlanta*, 40 Ga. App. 300, 149 S.E. 305 (1929); *Atlantic Ref. Co. v. Farrar*, 171 Ga. 371, 155 S.E. 327 (1930); *Thomason v. Sammon*, 174 Ga. 751, 164 S.E. 45 (1932);

Hall v. Moffett, 177 Ga. 300, 170 S.E. 192 (1933); *Wingate v. City of Doerun*, 177 Ga. 373, 170 S.E. 226 (1933); *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933); *Pittard v. Summerour*, 181 Ga. 349, 182 S.E. 20 (1935); *Perkerson v. Mayor of Greenville*, 51 Ga. App. 240, 180 S.E. 22 (1935); *Dickson v. Warren Co.*, 183 Ga. 746, 189 S.E. 839 (1937); *Warren v. Georgia Power Co.*, 58 Ga. App. 9, 197 S.E. 338 (1938); *Poole v. Arnold*, 187 Ga. 734, 2 S.E.2d 83 (1939); *Simpson v. Blanchard*, 73 Ga. App. 843, 38 S.E.2d 634 (1946); *Leonard v. State ex rel. Lanier*, 204 Ga. 465, 50 S.E.2d 212 (1948); *Lankford v. Dockery*, 85 Ga. App. 86, 67 S.E.2d 800 (1951); *Jordan v. Orr*, 209 Ga. 161, 71 S.E.2d 206 (1952); *Seckinger v. City of Atlanta*, 213 Ga. 566, 100 S.E.2d 192 (1957); *Barrow v. Georgia Lightweight Aggregate Co.*, 103 Ga. App. 704, 120 S.E.2d 636 (1961); *Southeastern Liquid Fertilizer Co. v. Chapman*, 103 Ga. App. 773, 120 S.E.2d 651 (1961); *Isley v. Little*, 219 Ga. 23, 131 S.E.2d 623 (1963); *Dumus v. Renfro*, 220 Ga. 33, 136 S.E.2d 753 (1964); *Cronic v. State*, 222 Ga. 623, 151 S.E.2d 448 (1966); *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *Whitehead v. Hasty*, 235 Ga. App. 331, 219 S.E.2d 443 (1975); *City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906 (1981); *Columbus v. Smith*, 170 Ga. App. 276, 316 S.E.2d 761 (1984); *Life for God’s Stray Animals, Inc. v. New N. Rockdale County Homeowners Ass’n*, 253 Ga. 551, 322 S.E.2d 239 (1984); *Meredith v. Thompson*, 312 Ga. App. 697, 719 S.E.2d 592 (2011); *Wilbros, LLC v. State*, 294 Ga. 514, 755 S.E.2d 145 (2014).

Power of Municipality to Create Nuisance

Municipality under a legal duty to create no nuisances. Insofar as the language in a requested charge by a defendant reflects this, it is redundant. Insofar as it states otherwise, it is simply wrong. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff’d*, 667 F.2d 97 (11th Cir. 1982).

Creating nuisance under guise of performing governmental function. — While it is true that a municipal corporation is not liable for the municipality’s

Power of Municipality to Create Nuisance (Cont'd)

acts of negligence in discharging a governmental function, yet a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life or health. *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 249 S.E.2d 224 (1978).

Effect of power to grade streets and establish drainage system. — General grant of power to grade streets and to establish in connection therewith a system of drainage does not carry with it any right on the part of the municipality to create and maintain a nuisance by causing surface water to be discharged upon the premises of a private citizen; and one may, when such a thing has been done, maintain against the city an action to recover the damages sustained in consequence thereof. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Effect of power to construct sewer and drain system. — Power to construct a system of sewers and drains does not authorize the municipal corporation to create a nuisance. In such a case the city cannot escape liability on the ground that the city is engaged in the performance of a governmental function. *Cannon v. City of Macon*, 81 Ga. App. 310, 58 S.E.2d 563 (1950), later appeal, 89 Ga. App. 484, 79 S.E.2d 816 (1954); *City of Rome v. Turk*, 235 Ga. 223, 219 S.E.2d 97 (1975).

County's failure to maintain a culvert. — Failure of a county to adequately maintain a culvert, resulting in property damage from flooding, was a nuisance when the county clearly knew of the flooding problems, and knew that construction developments upstream, which the county had approved, contributed to the flooding. *Fulton County v. Wheaton*, 252 Ga. 49, 310 S.E.2d 910 (1984), overruled on other grounds, *DeKalb County v. Orwig*, 261 Ga. 137, 402 S.E.2d 513 (1991).

Actions against municipality. — Action sounding in tort may be brought against a municipal corporation for the creation or maintenance of a nuisance, without reference to any question of negligence, if danger to health or life is involved; and an action sounding in tort

may be brought against a municipal corporation for the creation or maintenance of a nuisance if the defendant is negligent, even though the act was authorized to be done. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

Petition set out a cause of action for damages for the maintenance by the defendant of a sewage disposal plant in such manner as to cause a continuing nuisance dangerous to life and health, and was not subject to general demurrer on the ground that the city was at the time engaged in a governmental function. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

When a petition showed an improper maintenance of a sewerage disposal plant, with resulting injury to health and property damage, the fact that the alleged improper maintenance resulted from negligent acts on the part of the defendant city did not create a misjoinder of actions, but only strengthened the action as laid on the theory of a continuing nuisance. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

In a case where the property owner claimed that the city was liable in nuisance arising out of a water main break that damaged the property owner's property, the property owner failed to prove that the city was liable for a nuisance because the property owner did not present any evidence to show how long it took the city to begin work to repair the city's water main, how long it took to stop the flow of water, or that the city failed to do so in a reasonable time. *Atkinson v. City of Atlanta*, 325 Ga. App. 70, 752 S.E.2d 130 (2013).

In a case where the property owner claimed that the city was liable in nuisance arising out of a water main break that damaged the property owner's property, the property owner failed to prove that the city was liable for a nuisance because the property owner failed to show that the city operated or maintained a nuisance on the property owner's property as the water main break occurred only once and caused only one incident of flooding on the property, and the water was gone within about five days. *Atkinson v. City of Atlanta*, 325 Ga. App. 70, 752 S.E.2d 130 (2013).

In a case where the property owner claimed that the city was liable in nuisance arising out of a water main break that damaged the property owner's property, the property owner did not show that the city had a proactive duty to repair in a timely manner all the damage to the property owner's property rather than compensate the property owner for damages to the property. *Atkinson v. City of Atlanta*, 325 Ga. App. 70, 752 S.E.2d 130 (2013).

City could not be held liable for an alleged nuisance created by the homeowners' decision to plug an underground drainage pipe because there was no evidence that the city owned the pipe or exercised direct dominion and control over the pipe. *Merlino v. City of Atlanta*, 283 Ga. 186, 657 S.E.2d 859 (2008).

Classes of Nuisances

1. In General

Classification dependent upon particular facts. — Which particular things may, and which may not, be condemned as a nuisance usually stand or fall upon their own particular facts. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

Classes of nuisances. — There are three classes of nuisances: (1) nuisances per se, such as the obstruction of a stream; (2) nuisances dependent on circumstances, such as the conduct of a lawful business in certain surroundings. *Simpson v. DuPont Powder Co.*, 143 Ga. 465, 85 S.E. 344 (1915); and (3) continuing nuisances which are complements of the other two, as distinguished from a permanent nuisance. *City Council v. Lombard*, 101 Ga. 724, 28 S.E. 994 (1897).

2. Nuisance Per Se

Definition. — Nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstance, regardless of location or surroundings. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947).

Structures lawfully erected. — Nothing that is lawful in its erection can

be a nuisance per se. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Injunction. — Equity will not enjoin, as a nuisance per se, an act, occupation, or structure which is not a nuisance at all times or under all circumstances, regardless of location or surroundings. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940); *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

3. Nuisance in Fact or Per Accidens

Definition. — Nuisances in fact or per accidens are those which become nuisances by reason of circumstances and surroundings. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Larger class of nuisances are termed nuisances in fact or nuisances per accidens, and consists of those acts, occupations, or structures which are not nuisances per se but may become nuisances by reason of the circumstances or the location and surroundings. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Lawful enterprises. — Larger class of nuisances are termed nuisances in fact or nuisances per accidens. *Bacon v. Walker*, 77 Ga. 336 (1886); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

That which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance. *City of Atlanta v. Due*, 42 Ga. App. 797, 157 S.E. 256 (1931); *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940); *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 249 S.E.2d 224 (1978).

Business may be a nuisance either by reason of the business's location or by reason of the improper or negligent manner in which the business is conducted. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Lawful business cannot be a nuisance per se, although, because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Lawful business may, by reason of the

Classes of Nuisances (Cont'd)**3. Nuisance in Fact or Per****Accidens (Cont'd)**

business's location in a residential area, cause hurt, inconvenience, and damage to those residing in the vicinity and become a nuisance per accidens by reason of circumstances and surroundings. *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

Public projects as nuisances. — That which the law authorizes to be done, if done as the law authorizes, is not a nuisance. If a public project is legislatively sanctioned the project cannot be adjudged a nuisance. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Improper execution of authorized act. — This section in defining a nuisance, and in saying that the lawfulness of the act does not keep the act from being a nuisance, does not mean that an act may amount to a nuisance if the act is authorized by law and then is executed in accordance with the judgment or conclusion reached by the municipal authorities in the exercise of the governmental function; but the true interpretation of this section is that an act which the law authorizes to be done may result in an actionable nuisance only when there is negligence or error in the execution of the plans and specifications adopted or prescribed by the governing authority. *City of Atlanta v. Due*, 42 Ga. App. 797, 157 S.E. 256 (1931); *Southland Coffee Co. v. City of Macon*, 60 Ga. App. 253, 3 S.E.2d 739 (1939).

If the act itself is legal, it only becomes a nuisance when conducted in an illegal manner to the hurt, inconvenience, or damage of another. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938); *Southland Coffee Co. v. City of Macon*, 60 Ga. App. 253, 3 S.E.2d 739 (1939); *Lawrence v. City of La Grange*, 63 Ga. App. 587, 11 S.E.2d 696 (1940).

If one does an act, of itself lawful, which being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on that one to find some other place to do that act when the act it will not be injurious or offensive. *Asphalt Prods. Co. v. Marable*,

65 Ga. App. 877, 16 S.E.2d 771 (1941); *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944); *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

Importance of location of enterprise. — Nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

Thing that is lawful and proper in one locality may be a nuisance in another; in other words, a nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Though an act or thing be lawful, if, by reason of its location in a particular place it damages the property of another the act is a nuisance. *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947).

Injunction. — Equity will not enjoin, as a nuisance per accidens, an act, business, occupation, or structure, which, not being a nuisance per se, does not become a nuisance by reason of the particular circumstances of its operation or the location and surroundings, as by some improper manner of operation or improper connected acts. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940); *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

4. Continuing Nuisance

Definition. — Continuing nuisance does not necessarily mean a constant and unceasing nuisance, but a nuisance which occurs so often, and is so unnecessarily an incident of the use of property complained of, that it can be fairly said to be continuous, although not constant or unceasing. *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S.E. 193 (1898); *Keener v. Addis*, 61 Ga. App. 40, 5 S.E.2d 695 (1939).

Repetitive harm or inconvenience as nuisance. — Concept of nuisance involves repetition or condition causing hurt, inconvenience, or injury. The whole idea of nuisance is that of either a continuous or regularly repetitious act or condition which causes the hurt, inconvenience, or injury. A single isolated occurrence or act, which if regularly repeated would

constitute a nuisance, is not a nuisance, until the act is regularly repeated. *Leake v. City of Atlanta*, 146 Ga. App. 57, 245 S.E.2d 338 (1978), rev'd on other grounds, 243 Ga. 20, 252 S.E.2d 450 (1979).

Continuance gives rise to new cause of action. — Every continuance of a nuisance which is not permanent, and which could and should be abated, is a fresh nuisance for which a new action will lie. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

When one creates a nuisance, and permits the nuisance to remain, it is treated as a continuing wrong, and as giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is that one has a legal right, and is under a legal duty, to terminate the cause of the injury. *Keener v. Addis*, 61 Ga. App. 40, 5 S.E.2d 695 (1939).

Continuing nuisance gives a new cause of action for each day of the nuisance's continued maintenance, and in such a case in order to avoid a multiplicity of suits a court of equity will entertain jurisdiction to enjoin the nuisance and have the nuisance abated. *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948), later appeal, 207 Ga. 537, 63 S.E.2d 333 (1951).

Plaintiff's right to equitable relief was not barred by the statute of limitations on grounds that the nuisance complained of had existed for a period of more than four years prior to the institution of litigation, since when there is a continuing nuisance, a new cause of action arises daily and a court of equity takes jurisdiction in such a case to avoid a multiplicity of suits. *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

When the nuisance lay in the continuing contamination, not in the leaks which originally gave rise to the nuisance, damage was not complete and suit was not barred by the applicable four-year limitations period. *Hoffman v. Atlanta Gas Light Co.*, 206 Ga. App. 727, 426 S.E.2d 387 (1992).

When a municipality negligently constructs or undertakes to maintain a sewer or drainage system that causes the repeated flooding of property, a continuing

abatable nuisance is established, for which the municipality is liable. *Martin v. City of Ft. Valley*, 235 Ga. App. 20, 508 S.E.2d 244 (1998).

As the home buyers presented evidence that a developer's actions in clearing trees from the adjacent property increased the surface water flow and erosion on their land and made their drainage problem worse, these facts would support a finding of a continuing nuisance. *Walker v. Johnson*, 278 Ga. App. 806, 630 S.E.2d 70 (2006), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

Original nuisance always precedes continuing nuisance. — If there was no original nuisance, there could be no continuing nuisance. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938); *Davis v. Beard*, 202 Ga. App. 784, 415 S.E.2d 522 (1992).

Duty of wrongdoer to terminate continuing nuisance. — When one creates a nuisance, and permits the nuisance to remain, the nuisance is treated as a continuing wrong, and as giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is that one has a legal right, and is under a legal duty, to terminate the cause of the injury. *Keener v. Addis*, 61 Ga. App. 40, 5 S.E.2d 695 (1939).

Trial court did not err by denying a church's motion for judgment notwithstanding the verdict in a property owner's action for trespass and nuisance on the ground that there was an absence of evidence of negligence or proximate cause linking the church to the owner's injuries because the evidence showed that excess rainwater flowed from the church property onto the owner's property in a continuing manner; even though the church did not cause the initial leak, own the water that leaked, or have any responsibility for the compaction of the soil around the underground utility lines, the jury could find that the initial leak caused a condition on its property that in turn caused continued excessive flooding of the owner's property thereafter. *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert.

Classes of Nuisances (Cont'd)**4. Continuing Nuisance (Cont'd)**

denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

Prescription does not run in favor of a continuing nuisance. *Gabbett v. City of Atlanta*, 137 Ga. 180, 73 S.E. 372 (1911).

Equity jurisdiction of continuing nuisance. — If a nuisance is a continuing one, a court of equity will take jurisdiction to enjoin such a nuisance. *Ford v. Crawford*, 240 Ga. 612, 241 S.E.2d 829 (1978).

When plaintiff entitled to equitable relief. — If alleged conduct constitutes a continuing nuisance, the plaintiff is entitled to equitable relief. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Accrual right of action. — Nuisance, permanent and continuing in the nuisance's character, the destruction or damage being at once complete upon the completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately upon the creation of the nuisance, and against which the statute of limitations begins, from that time, to run. *City of La Fayette v. Hegwood*, 52 Ga. App. 168, 182 S.E. 860 (1935).

Manner of Proof

Contents of complaint. — In a nuisance action the complainant must show the existence of the nuisance complained of, that one has suffered injury, and that the injury complained of was caused by the alleged nuisance. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Nuisance per accidens. — Petition alleging that, at a place of business located on a main thoroughfare, outside the corporate limits of any municipality, beer and wine are being sold, a juke box operated, both day and night, making a loud noise which disturbs and hinders the residents of the neighborhood from sleep, that drunk people congregate and come out of the place cursing, fighting, and making undue noise, and many people of disreputable character gather, and that

beer is sold there on Sunday in violation of law, is sufficient to charge the existence of an abatable public nuisance, and therefore stated a cause of action and one which the solicitor-general (now district attorney) could bring proceedings to abate. *Davis v. State ex rel. Lanham*, 199 Ga. 839, 35 S.E.2d 458 (1945) (decided, in part, under former Code 1933, § 26-6103).

See *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Information of a district attorney filed on the application of a citizen — to the effect that the defendant knowingly maintained and used a building for the purposes of gaming and had in the building a certain paper card, dice and other contents, which should also be declared to be a nuisance — were sufficient, as against the general and special grounds of the defendant's demurrer, to set forth a cause of action, to abate the place as a common nuisance. *Thornton v. Forehand*, 211 Ga. 658, 87 S.E.2d 865 (1955).

DFL Indirect damage of aesthetic value. — Allegations that the appellees' actions taken on the appellees' own property have indirectly damaged the aesthetic value of the plaintiff's property fail to state a cause of action. *Jillson v. Barton*, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

When the allegations of the petition could be construed as sufficient to show creation of a public nuisance, there being no allegations that the abatement of the nuisance in the manner authorized by law would not afford the petitioners adequate relief, a writ of mandamus would not lie. *State Hwy. Dep't v. Reed*, 211 Ga. 197, 84 S.E.2d 561 (1954).

Insufficient allegations. — Allegations of the petition seeking to enjoin an alleged nuisance in operating an asphalt and cement-mixing and manufacturing plant as to the spilling of concrete and asphalt in a public street and its effect on persons walking along the street related to a public nuisance, and stating no special damage, showed no cause of action. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940).

Petition fell short of describing a public nuisance when there was no allegation that from the points where the sewage was deposited by the defendant city the

streams flowed through the lands owned by anyone other than the plaintiff, or that anyone other than the plaintiff was damaged thereby. *Vickers v. City of Fitzgerald*, 216 Ga. 476, 117 S.E.2d 316 (1960), overruled on other grounds, *City of Chamblee v. Maxwell*, 264 Ga. 635, 452 S.E.2d 488 (1994).

Because an Olympic Committee acted in a lawful manner in operation of an Olympic Park, and no evidence was presented to the contrary, a nuisance claim against the committee lacked merit. *Anderson v. Atlanta Comm. for the Olympic Games, Inc.*, 261 Ga. App. 895, 584 S.E.2d 16 (2003), *aff'd*, sub nom. *Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne*, 278 Ga. 116, 598 S.E.2d 471 (2004).

Test for nuisance. — Determining factor in an alleged nuisance is not its effect upon persons who are invalids, afflicted with disease, bodily ills, or abnormal physical conditions, or who are of nervous temperament, or peculiarly sensitive to annoyances or disturbances of the character complained of. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

In the determination of whether a given state of facts discloses a nuisance, the general effect of the condition shown on an ordinary person, rather than one of abnormal sensibilities and feelings, is the proper consideration. *Dorsett v. Nunis*, 191 Ga. 559, 13 S.E.2d 371 (1941).

Test of whether an act or thing complained of is a nuisance is whether it would be offensive to persons of ordinary feelings and sensibilities, and not those of fastidious taste or temperament. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

Business as nuisance. — To make a business a nuisance the business must be such to people of ordinary nature or condition; it is not sufficient if the business be simply offensive to delicate and sensitive organizations. *Ruff v. Phillips*, 50 Ga. 130 (1873).

Threat of inconvenience. — Mere apprehension of inconveniences arising from a filling-station in course of construction, the same being for a lawful business use, is not sufficient to authorize an injunction. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S.E. 1126

(1910); *Standard Oil Co. v. Kahn*, 165 Ga. 575, 141 S.E. 643 (1928).

Negligence not required. — Negligence is not a necessary ingredient of a cause of action growing out of a nuisance. *Cannon v. City of Macon*, 81 Ga. App. 310, 58 S.E.2d 563 (1950), later appeal, 89 Ga. App. 484, 79 S.E.2d 816 (1954).

Comfortable enjoyment of premises must be sensibly diminished. — In a nuisance action the occupants of a dwelling house must show that the comfortable enjoyment of the premises has been sensibly diminished, either by actual, tangible injury to the property itself, or by the promotion of such physical discomfort as detracts sensibly from the ordinary enjoyment of life. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Jury determination of public nuisance. — Whether or not the acts of the defendant constituted a public nuisance, as contended by the plaintiff and denied by the defendant, is an issue for the jury to determine. *Scott v. Reynolds*, 70 Ga. App. 545, 29 S.E.2d 88 (1944).

While it is no longer required that the plaintiff in a nuisance case show, as the plaintiff had to do at common law, a freehold interest in the property affected by the nuisance, and while the plaintiff no longer need show damage to the realty itself, the plaintiff must still show that the condition is injurious by reason of its relationship to the plaintiff's home or property in the neighborhood where it is located, or else that it is injurious by reason of its constituting an obstruction to streets or sidewalks and like places used by the public generally for passage, which obstructions were at common law regarded as public nuisances because they interfered with the public right of passage. *Stanley v. City of Macon*, 95 Ga. App. 108, 97 S.E.2d 330 (1957).

Damages

Nominal damages. — When a nuisance is shown to exist, the law imports damages for an injury to the right, and at least nominal damages may be recovered to protect the right. *Asphalt Prods. Co. v.*

Damages (Cont'd)

Marable, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Damages by public nuisance. — Private citizen specially damaged by a public nuisance may proceed in the citizen's own name and behalf to have the nuisance abated. *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903).

Manner of alleging damages. — General allegation of damage is sufficient to entitle a recovery of all damages that are the natural consequence of the nuisance; but when special damages are alleged, the defendant should be apprised of the items thereof. *Exley v. Southern Cotton Oil Co.*, 151 F. 101 (S.D. Ga. 1907).

Recovery of damages. — In cases of nuisances which cause permanent injury to land, the ordinary rule is that the measure of damages is the depreciation in the market value; in regard to nuisances which are of a nonpermanent, abatable, or temporary nature, the depreciation in the usable or rental value ordinarily furnishes the measure. But, under some circumstances, there may also be a recovery for special damages. *Ward v. Southern Brighton Mills*, 45 Ga. App. 262, 164 S.E. 214 (1932).

There can be no recovery for damage flowing merely from an improper or defective or negligent construction or maintenance of a public improvement which results in an abatable continuing nuisance on the theory that plaintiff's property has been appropriated by its erection and maintenance. *Rhines v. Commissioners of Chatham County*, 50 Ga. App. 844, 179 S.E. 140 (1935).

Damages for depreciation in the market value of property are appropriate in a suit against a municipality for the taking or damaging of property for public use and also in a suit for a permanent and continuing nuisance created by the municipality, recovery of such damages must be had within four years from the date of the original injury. *City of La Fayette v. Hegwood*, 52 Ga. App. 168, 182 S.E. 860 (1935).

Owner-occupant is entitled to recover damages for annoyance and discomfort temporarily depriving the owner of the

unrestricted use and full enjoyment of the owner's premises, in addition to damages for permanent injury to the freehold and for pain and suffering as a result of the maintenance of a nuisance. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

If permanent injury is sustained as the result of the maintenance of a nuisance, then the owner of the property damaged is entitled to compensation for such permanent injury, whether the nuisance is abated or abatable. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

In the case of a private abatable nuisance, such as the operation of an asphalt mixing plant, the plaintiff is entitled to recover for any direct damage to the plaintiff's person or to the plaintiff's property resulting from the nuisance, accruing within the statute of limitations and up to the filing of the petition. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

Owner of a dwelling house which the owner occupies as a home is entitled to just compensation for the annoyance and discomfort occasioned by the maintenance, by another, of a nuisance on adjacent premises. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

For damages for permanent injury to property for an unabatable nuisance, there can be but one recovery. "A nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately upon the creation of the nuisance ... Where the original nuisance to land is of a permanent character so that the damages inflicted thereby are permanent, a recovery not only may, but must, be had for the entire damages in one action; and such damages accrue from the time the nuisance is created, and from that time the statute of limitations begins to run." *Price v. Georgia Indus. Realty Co.*, 132 Ga. App. 107, 207 S.E.2d 556 (1974).

Apportionment of damages. — Court of equity, acquiring jurisdiction for the purpose of abating a nuisance, will also,

upon proper averments, extend such jurisdiction to the ascertainment and determination of the damages suffered by reason of the nuisance, and in such event a court of equity may severally apportion damages among the defendants for the defendants' proportionate contribution to the injury. *Vaughn v. Burnette*, 211 Ga. 206, 84 S.E.2d 568 (1954).

Illustrative Cases

Airplanes. — Since the evidence showed that at least 75 flights were made over the plaintiff's school building daily at altitudes of from 50 to 75 feet, just over the top of the plaintiff's trees, that the danger necessarily created thereby to the life and safety of those occupying the plaintiff's premises, the noise and vibration caused thereby, and the distracting effect on the plaintiff's students made further operation of the plaintiff's school impracticable, and that by such flights the right to enjoy freely the use of the plaintiff's property has been substantially lessened, a continuing nuisance was established which equity would enjoin. *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

Air pollution. — Pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society, is not actionable; but the right must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Asphalt mixing plant. — While the operation of an asphalt mixing plant is not a nuisance per se, it may become a nuisance in fact or a nuisance per accidens by reason of the circumstances or the location and surroundings. *Sam Finley, Inc. v. Russell*, 75 Ga. App. 112, 42 S.E.2d 452 (1947).

Asphalt-manufacturing and cement mixing plant. — Operation of an asphalt-manufacturing and cement-mixing plant is not a nuisance per se. Nor does it become a nuisance per accidens, if it is conducted in a manufacturing section of a city, merely because the plant is operated by coal or some fuel discharging obnoxious smoke and cinders, or releases

dust, or is accompanied by loud rattling noises during the day and night, and is within 200 feet of a residence, when it is not shown that such operation is in a residence neighborhood, or that the manner of operation is unusual in a business of this character, or unnecessary and avoidable. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Recreational use of baseball park. — Playing of ordinary games of baseball, or the operation of a park for such games, in a lawful, decent, and orderly manner, and accompanied only by the usual cheers and noise of spectators, where these contests are harmlessly played and enjoyed, is not a nuisance per se. Such games or pursuits may, however, become a nuisance per accidens, when there is indecent, disorderly, or improper conduct of the players or spectators; or when, in a residential community, there is accompanying noise, which is excessive and unreasonable, or which recurs at unusual and unreasonable hours of the night, so as to prevent the sleep of ordinary, normal, reasonable persons of the neighborhood. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

Billboards. — Billboard erected by defendants on the defendants' own land, which is not otherwise a nuisance, does not become one merely because the billboard is erected maliciously or from spite or ill will, when the billboard serves a useful purpose. *Campbell v. Hammock*, 212 Ga. 90, 90 S.E.2d 415 (1955).

Slaughterhouses and similar enterprises. — Certain businesses or structures, such as slaughterhouses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the neighborhood of family residences. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Business solicitation of private home. — To arbitrarily declare, without qualification, that every solicitor who goes to a private home to try to conduct an otherwise perfectly legal business is a nuisance and subject to fine or imprisonment is an unreasonable interference with a solicitor's normal legal rights, and is without due process of law. *De Berry v.*

Illustrative Cases (Cont'd)

City of La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Church in residential section. — Church though erected in a residential section is not per se a nuisance. *Dorsett v. Nunis*, 191 Ga. 559, 13 S.E.2d 371 (1941).

Creating and spreading dust. — Creation and spreading of dust in such large and unusual quantities as unreasonably to contaminate the atmosphere and endanger the health and lives of the citizens is not within the actual or implied authority of an airport franchise, and those responsible therefor, despite any immunity or limited liability, may be held to full accountability for the maintenance of a nuisance. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Spread of dust upon the property of another in excessive and unreasonable quantities may amount to a physical invasion of another's property rights. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Dust is a physical substance, or an aggregation of substances, gathered from the earth. It may contain impurities and result directly in disease or physical injury; one cannot be forced to endure dust from the negligence of another even though the business from which the dust springs may be expressly authorized by law. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Fair occupying street. — Ferris wheels and other devices for amusement, which fair a company of the state militia is permitted to station on the street for a week, is a public nuisance and a court of equity has jurisdiction, at the instance of the solicitor-general (now district attorney), to restrain it by injunction. *City Council v. Reynolds*, 122 Ga. 754, 50 S.E. 998, 106 Am. St. R. 147, 69 L.R.A. 564 (1905).

Filling station. — Filling-station is not per se a nuisance. *Standard Oil Co. v. Kahn*, 165 Ga. 575, 141 S.E. 643 (1928).

Injuries and inconveniences to persons residing near filling station, such as noises, etc., which result ordinarily and from necessity in the conduct of their business of repairing cars, trucks, and

tires, are not to be classed as nuisances. *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 4 S.E.2d 155 (1939).

Flooding after plugging of underground drainage pipe. — In a suit involving two landowning couples, it was error to grant summary judgment to the second couple on the first couple's nuisance claim after the second couple plugged an underground drainage pipe. Although the act of plugging the pipe might not have been wrongful in itself, the potential consequence of the uphill flooding of the first couple's property after the pipe was plugged created an issue of fact as to whether the couple could be held liable for creating a continuing nuisance. *Merlino v. City of Atlanta*, 283 Ga. 186, 657 S.E.2d 859 (2008).

Gaming house. — Maintenance of a gaming house or a gaming place is a public nuisance. *Thornton v. Forehand*, 211 Ga. 658, 87 S.E.2d 865 (1955).

Veterinary hospital. — Operation of a dog and cat hospital is a lawful enterprise and is not a nuisance per se, and cannot be enjoined unless it becomes a nuisance by reason of the particular circumstances of its improper operation or improper connected acts. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

Injury to health. — All injury to health is special, and necessarily limited in its effect to the individual affected, and is, in its nature, irreparable. It matters not that others within the sphere of the operation of the nuisance, whether public or private, may be affected likewise. *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

Livery stable. — Livery stable in a town is not necessarily a nuisance in itself; and therefore a court of equity has no jurisdiction to restrain by injunction either the completion of a building because intended for that purpose, or its appropriation to the use intended. *Thomason v. Sammon*, 174 Ga. 751, 164 S.E. 45 (1932).

Hog and chicken feed manufacturing plant. — Mere erection of a plant for the manufacture of hog and chicken feed from the entrails from poultry and other animals is not without more a nuisance per se, and the allegations of the petition do not show it to be such. *Poultryland, Inc.*

v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946).

Noise. — When noise accompanies an otherwise lawful business or pursuit, the question whether such noise is a nuisance depends upon the nature of the locality as a residence community or otherwise, on the degree of intensity and disagreeableness of the sounds, on their times and frequency, and in all cases, under the preceding rules, on their effect, not upon peculiar and unusual individuals, but upon the ordinary, normal, reasonable persons of the locality. Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568 (1938).

Noxious trade or business as nuisance. — To constitute a nuisance, it is not necessary that a noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. Benton v. Pittard, 197 Ga. 843, 31 S.E.2d 6 (1944); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946); City of Macon v. Cannon, 89 Ga. App. 484, 79 S.E.2d 816 (1954); Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313 (1957).

Nuisance claim barred by statute of repose. — Purchaser's nuisance claims against a county, the county health department, and builders were barred by the statute of repose, O.C.G.A. § 9-3-51, because the purchaser could not maintain a nuisance action under the facts asserted in the purchaser's complaint; a plaintiff cannot maintain a nuisance claim that is based upon damage to a house resulting from a defect constructed into the house that was concealed from the plaintiff by the builder and/or the seller because, instead, the applicable causes of action are fraud against the seller and/or negligent construction against the builder. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

Obstructing streets. — Proper authorities may entertain an application to abate a nuisance caused by the obstruction of a city street or public alley. Carlisle v. Wilson, 110 Ga. 860, 36 S.E. 54 (1900); Robins v. McGehee, 127 Ga. 431, 56 S.E. 461 (1907); Hendricks v. Jackson, 143 Ga.

106, 84 S.E. 440 (1915); Hendricks v. Carter, 21 Ga. App. 527, 94 S.E. 807 (1918).

Action to abate nuisance, caused by obstruction of a city street or public alley, may be maintained by anyone whose property will be injuriously affected. Coker v. Atlanta, K. & N. Ry., 123 Ga. 483, 51 S.E. 481 (1905).

When there is actual obstruction of a portion of a road intended for travel, actual interference or inconvenience is immaterial. Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 192 Ga. 817, 16 S.E.2d 753 (1941).

If a street or alley was a public street or alley, the obstruction or encroachment upon it by an adjoining landowner would constitute a public nuisance subject to abatement on petition of a user of the alley if special injury were shown to have occurred to the user by the obstruction. Henderson v. Ezzard, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

When, in an equitable petition, the only prayer for specific relief was that the defendant be temporarily restrained and permanently enjoined from maintaining a barricade or obstruction, which it had placed in a public street, or that it be required to abate the alleged nuisance, and the barricade or obstruction was fully completed and existing when the suit was instituted, it was erroneous to overrule a general demurrer (now motion to dismiss) to the petition as amended, which pointed out that the plaintiff was not entitled to the relief prayed for since it has an adequate and a complete remedy at law; a party who complains only of a completed existing obstruction in a public street must pursue the remedy which the statute affords that party. City of East Point v. Henry Chanin Corp., 210 Ga. 628, 81 S.E.2d 812 (1954).

Permanent obstruction of city streets. — Right to the use of the streets of a city is in the public, and any permanent obstruction thereof which materially impedes travel is a nuisance per se. Williamson v. Souter, 172 Ga. 364, 157 S.E. 463 (1931).

Any permanent structure in a road which materially interferes with travel is a nuisance per se, and any obstruction

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permanent in nature or continuously maintained, which interferes with the free use of the road by the public, is a public nuisance, and it is immaterial that space may be left on either side of the obstruction for the passage of the public. The public has the right to the unobstructed use of the whole road as the road was acquired by the county or city. *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948), later appeal, 207 Ga. 537, 63 S.E.2d 333 (1951).

In view of evidence that a property owner's private road impeded the necessary passage of a city's emergency personnel so as to significantly endanger the health and safety of those persons residing at apartment complexes adjacent to the road, the owner was improperly granted summary judgment in the city's suit seeking abatement of a public nuisance under O.C.G.A. § 41-1-2. *City of College Park v. 2600 Camp Creek, LLC*, 293 Ga. App. 207, 666 S.E.2d 607 (2008).

Permanent structures which do not interfere with travel. — Permanent structures which do not interfere with travel, and which are erected for public purposes, such as telegraph and telephone poles, and the like, are permissible; it is not every use by an individual of a street or highway which constitutes a public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

Any permanent structure in a public road which materially interferes with travel therein is a nuisance per se. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

If a street or alley was a public street or alley, the obstruction or encroachment upon it by an adjoining landowner would constitute a public nuisance subject to abatement on petition of a user of the alley if special injury were shown to have occurred to the user by the obstruction. *Henderson v. Ezzard*, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

Since the evidence was uncontradicted that an alley had been used by the public in general for more than 20 years prior to the alley's obstruction 30 years prior to

trial by the defendant, a finding was demanded that the public had acquired a prescriptive right to the free and unobstructed use of the alley and that it was a public alley, and since prescription does not run against a municipality as to land held for the benefit of the public, such as a public alley, the obstruction must be removed. *Henderson v. Ezzard*, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

Cellular tower was not a nuisance as the tower was lawfully constructed. *Sanders v. Henry County*, No. 11-13717, 2012 U.S. App. LEXIS 14560 (11th Cir. July 17, 2012) (Unpublished).

Pavement broken by ordinary use. — Private corporation is not liable to a person injured by the crumbling of the pavement on a sidewalk which was caused by ordinary wear and tear of its trucks when crossing to enter one of its alleys. *McAfee v. Atlantic Ice & Coal Corp.*, 26 Ga. App. 25, 105 S.E. 631 (1920).

State prison labor on county projects. — Utilizing state prison labor on county projects is not, by itself, "nuisance" for which the county would be liable; the county could not be liable for a nuisance unless the act complained of amounted to a taking for public purposes. *West v. Chatham County*, 177 Ga. App. 417, 339 S.E.2d 390 (1985).

Public institution. — Fact alone that a proposed clinic is to be operated as a public institution would not necessarily prevent the clinic from being a nuisance if located in a residential section. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

"Purpresture." — Purpresture as defined at common law, and recognized in this and other states, is when one encroaches and makes that serviceable to one which belongs to many. Thus, any encroachment upon a public street or highway is a purpresture; and if the public use is impeded or rendered less commodious, such encroachment is generally not only a purpresture, but also technically a public nuisance, regardless of the degree of interference with the common enjoyment. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

It is not true that every purpresture is a public nuisance. It may or may not be

such, according to the particular facts. Although the two may coexist, either may exist without the other. The rule both in reason and by authority is that, unless the public sustain or may sustain some degree of inconvenience or annoyance in the use of a public highway or street or other public property, there is no public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

While there may be language in some decisions indicating that a purpresture is always a public nuisance, the terms are not synonymous. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

Railroads or other quasi-public facilities. — If the relocation of the defendant's track was done under lawful authority, the act would not constitute a nuisance. If the track was relocated in a proper manner and was maintained in a proper manner there was no nuisance. Tracks are laid down for the purpose of operating trains thereon. If the trains are operated in a proper manner, such operation does not constitute a nuisance. Necessarily the running of trains makes some noise and produces some vibrations. Locomotives pulling trains emit some smoke, sparks, and cinders, but these incidental results do not necessarily constitute a nuisance, but are the necessary incidents of the franchise granted a railroad company in connection with the conduct of its business. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

Injuries and inconveniences to persons residing near railroads or other quasi-public facilities from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are the necessary concomitants of the franchises granted. *Central of Ga. R.R. v. Collins*, 232 Ga. 790, 209 S.E.2d 1 (1974).

What is merely a matter of convenience to a railroad company is not a necessity and may constitute a nuisance. *Central of Ga. R.R. v. Collins*, 232 Ga. 790, 209 S.E.2d 1 (1974).

Sale of intoxicants. — Illegal sale of intoxicating liquors is a public nuisance, affecting the whole community in which the sale is carried on, and may be abated by process instituted in the name of the state. *Lofton v. Collins*, 117 Ga. 434, 43 S.E. 708, 61 L.R.A. 150 (1903); *Walker v. McNelly*, 121 Ga. 114, 48 S.E. 718 (1904); *Dispensary Comm'rs v. Hooper*, 128 Ga. 99, 56 S.E. 997 (1907).

Keeping or maintaining of any place or resort where intoxicating liquor is sold or kept for sale in a dry county, in violation of the provisions of Ch. 10 of T. 3 is a public, common nuisance, which may be abated by writ of injunction issued out of the superior court upon a bill filed by the attorney or the district attorney of the circuit, or by any citizen or citizens of such county. *Ogletree v. Atkinson*, 195 Ga. 32, 22 S.E.2d 783 (1942).

Private citizen cannot maintain an action to enjoin the operation of a retail liquor business without a valid license in a "wet" county unless the citizen has sustained special injury, and its abatement must proceed for the public on information filed by the solicitor general (now district attorney). *Mabry v. Shikany*, 223 Ga. 513, 156 S.E.2d 364 (1967).

Smoke. — To constitute smoke a nuisance, it must be such as to produce a visible, tangible, and appreciable injury to property, or such as to render it specially uncomfortable or inconvenient, or to materially interfere with the ordinary comfort of human existence. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Smoke, unaccompanied with noise or noxious vapor, noise alone, offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Trial court erred by granting the neighbors' motion for summary judgment in a property owners' action to recover damages arising from smoke emanating from the neighbors' outdoor fireplace because the evidence was sufficient to create a jury question on the issue of whether the smoke from the neighbors' outdoor fire-

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place would reasonably interfere with an ordinary person's enjoyment of life; the neighbors had a fire in their outdoor fire-place approximately thirty times in a three-year period, and each time, the owners could smell the smoke in their home and suffered from itchy eyes, headaches, scratchy throats, and breathing problems. *Weller v. Blake*, 315 Ga. App. 214, 726 S.E.2d 698 (2012).

Steam laundry is not a nuisance per se, and "smoke is not per se a nuisance" but a business otherwise lawful may become a nuisance in fact, or a nuisance per accidens, by reason of improper operation, or by reason of its location and the injury produced by such a lawful business is actionable if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947).

Taxi cabs. — In a wrongful death and nuisance suit wherein the victim was killed while traveling in a taxi cab on a state highway, and the taxi cab had passed a mandatory city inspection the day prior, the trial court properly granted summary judgment to the city on the nuisance claim; as a matter of law, the city had no notice of a dangerous condition within the meaning of a nuisance via its inspection as, even though there was evidence in the record that the inspector did not measure tire tread depth, there was no evidence that taxicabs with insufficient tread on their tires routinely passed city inspections and thereafter were involved in collisions that caused injury. *Heller v. City of Atlanta*, 290 Ga. App. 345, 659 S.E.2d 617 (2008), *aff'd*, *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

Decedent was killed when the taxi in which the decedent was riding spun out of control on a rain-slick road and hit a tree. An isolated incident involving a city inspector's giving the taxi a passing grade despite the taxi's extremely worn tires was insufficient to give rise to a nuisance claim against the city. *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

Mills. — Appeals court affirmed summary judgment for a chip mill; the mill

was operated lawfully in a county location that the mill and county specifically negotiated and rezoned for the mill's operation, and the lawful operation was not conditioned on hours of operation, so the mill's operation was not a nuisance. If the act is lawful in itself, it becomes a nuisance only when conducted in an illegal manner to the hurt, inconvenience, or damage of another. *Effingham County Bd. of Comm'rs v. Shuler Bros.*, 265 Ga. App. 754, 595 S.E.2d 526 (2004).

Display and sale of tombstones and monuments. — Mere display and sale of tombstones and monuments designed and intended to be placed over the bodies and graves of deceased persons, such display being made on a lot in an exclusively residential section and in such manner as to present a "graveyard appearance," is not a nuisance, and may not be enjoined by residents and owners of property in the vicinity, on the grounds that it injuriously affects the values of their properties, and that the constant appearance of the spectacle would prey upon the minds and injuriously affect the health of the individuals. *Grubbs v. Wooten*, 189 Ga. 390, 5 S.E.2d 874 (1939).

Increase in traffic congestion. — Increase in traffic congestion in front of property resulting from construction of townhouse on adjacent property is a fanciful assertion of harm and does not constitute a nuisance. *Goddard v. Irby*, 255 Ga. 47, 335 S.E.2d 286 (1985).

Unsigntiness of adjacent property. — Unsigntiness of adjacent property alone, tending to devalue the adjoining property, is not such inconvenience as to amount to a nuisance for which an injunction will lie. *Jillson v. Barton*, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

Interference with the natural flow of surface water may amount to a nuisance, without the presence of the element of danger to health. *City of Macon v. Cannon*, 89 Ga. App. 484, 79 S.E.2d 816 (1954).

Wholesale grocery business in a residential section of a city is not necessarily a nuisance of itself, and therefore a court of equity will not enjoin the construction of a building to be used for that purpose, where there is no zoning regulation or

restrictive covenant inhibiting such use. *Roberts v. Rich*, 200 Ga. 497, 37 S.E.2d 401 (1946).

Detention pond. — Judgment entered for plaintiffs on plaintiffs' nuisance claim was proper; although the developer's maintaining a detention pond was itself legal, it became a nuisance when conducted in an illegal manner to the damage of plaintiffs' land. The fact that the defendant did not own the pond that created the nuisance did not shield the defendant from liability, as the jury could have found from the defendant's ownership interest in the entity that maintained the detention pond that the defendant had sufficient control over the decision not to modify the pond so as to hold it liable for the damages caused by the pond. *Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 569 S.E.2d 608 (2002).

Wrongful diversion of water onto property of another. — To wrongfully turn water on the lands of another is a nuisance. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

Excess water runoff. — In two cases involving a dispute for nuisance and trespass arising out of excessive water runoff which flowed onto a landowner's land, the trial court's grant of summary judgment to a construction contractor was reversed, while the denial of summary judgment to a developer was affirmed, as: (1) the testimony as to the presence of the excess runoff and its cause, presented questions of fact for a jury; (2) merely because the county approved the development activities did not mean that either the contractor or the developer or both could not be held liable for a nuisance; and (3) the landowner's action against the alleged creators of the water-runoff was authorized, regardless of the landowner having sold the property. *Green v. Eastland Homes, Inc.*, 284 Ga. App. 643, 644 S.E.2d 479 (2007), cert. denied, 2007 Ga. LEXIS 629 (Ga. 2007).

Diversion of surface water. — County is subject to suit for damages, as well as injunctive relief, for maintaining a roadway in such manner as to constitute a continuing nuisance by diverting surface water onto the owner's property, and it is no defense that the property is not adja-

cent to the roadway in question. *Reid v. Gwinnett County*, 242 Ga. 88, 249 S.E.2d 559 (1978).

Landowners' of a lakefront property created a nuisance when the owners went onto a corporation's dam and plugged the weakened dam to prevent a lake from draining. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Although the government required the owners of a weakened dam to take certain safety precautions to maintain the level of water in a lake at a low level, the owners' refusal to repair the dam was not a justification for creating a nuisance. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Jury properly awarded damages against a corporation and in favor of the lakefront landowners because the corporation created a nuisance by attempting to breach the dam and drain the lake, rather than repairing and maintaining a dam so the dam could impound water. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Railroad and city alleged to have failed to maintain a culvert and drainage pipe that caused flood damage. — Appellate court erred by reversing summary judgment to a railroad and a city in the homeowners' nuisance and negligence suit as the homeowners' permanent nuisance claim was barred by the four year statute of limitations period set forth in O.C.G.A. § 9-3-30; and the homeowners failed to show triable issues of fact on the homeowners' continuing nuisance claim that the railroad improperly maintained the culvert and drainage pipe at issue or that the city had any duty to maintain the culvert and pipe since the homeowners failed to show that the city had taken any control over the property in question. *City of Atlanta v. Kleber*, 285 Ga. 413, 677 S.E.2d 134 (2009).

Electromagnetic radiation. — In an action against a utility and power company for damages on theories of trespass and nuisance arising from electromagnetic radiation, a grant of summary judgment on the trespass claim and directed verdict on the nuisance claim were proper for policy reasons since the scientific evi-

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dence was inconclusive regarding the invasive quality of magnetic fields from power lines. *Jordan v. Georgia Power Co.*, 219 Ga. App. 690, 466 S.E.2d 601 (1995).

Criminal attack not result of nuisance. — Church was not liable for nuisance to an injured party who was criminally attacked adjacent to its property by

a third-party as a one-time occurrence did not amount to a nuisance and was an isolated occurrence or act, despite the injured party's accusations that the assailant might have been concealed in the bushes near the abandoned church building before attacking the victim. *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 580 S.E.2d 587 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Municipality's potential liability for acts of a probationer working on a community service project will have to be determined from the facts in each case, which will show whether the injury was the result of a nuisance, as defined in

former Code 1933, § 72-101 (see now O.C.G.A. § 41-1-1), or negligence, as stated in former Code 1933, § 69-301 (see now O.C.G.A. § 36-33-1). 1975 Op. Att'y Gen. No. 75-32.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, § 1-3.

C.J.S. — 66 C.J.S., Nuisances, §§ 1-12.

ALR. — Trolley poles in street as nuisance, 2 ALR 496.

Proximate cause as determining landlord's liability, where injury results to a third person from a nuisance that becomes only upon tenant's using the premises, 4 ALR 740.

Pesthouse or contagious disease hospital as nuisance, 4 ALR 995; 18 ALR 122; 48 ALR 518.

Steam whistle as a nuisance, 4 ALR 1343.

Operation of railroad as nuisance to property, 6 ALR 723; 69 ALR 1188.

Nuisance resulting from smoke alone as subject for injunctive relief, 6 ALR 1575.

Fire escape as an attractive nuisance, 9 ALR 271.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor, 12 ALR 431; 121 ALR 642.

Liability of purchaser of premises for nuisance thereon created by predecessor, 14 ALR 1094.

Injunction against operation of talking machine, mechanical musical device, etc., 22 ALR 1200.

Noise from operation of industrial plant as nuisance, 23 ALR 1407; 90 ALR 1207.

Nuisance by encroachment of walls or other parts of building on another's land as permanent or continuing, 29 ALR 839.

Gas, water, or electric light plant as a nuisance, and the remedy therefor, 37 ALR 800.

Nuisance by manner of or circumstances attending performance of duty enjoined by law, 38 ALR 1437.

Attractive nuisances, 45 ALR 982; 53 ALR 1344; 60 ALR 1444.

Public "comfort stations", 55 ALR 472.

Induction, conduction and electrolysis, 56 ALR 421.

Tramroad or other private railroad as a nuisance, 57 ALR 943.

Newspaper or magazine as a nuisance, 58 ALR 614.

Burning of soft coal as a nuisance, 58 ALR 1225.

Oil as nuisance; liability for damage to adjoining property, 60 ALR 483.

Mosquitoes or other insect pests; conditions breeding as a nuisance, 61 ALR 1145.

Injunction against use of property for circuses, carnivals, and similar itinerant outdoor amusements, 63 ALR 407.

Pipeline as nuisance, 75 ALR 1325.

Dogs as nuisance, 79 ALR 1060.

Bakery as a nuisance, 86 ALR 998.

Liability of public contractor for damages from acts or conditions necessarily incident to work which would otherwise amount to nuisance, 97 ALR 205.

Aeroplanes and aeronautics, 99 ALR 173.

Cremation and crematories, 113 ALR 1128.

Automobile gas filling or supply station as a nuisance, 124 ALR 383.

Gas company's liability for injury or damage by escaping gas, 138 ALR 870.

Injunction against acts or conduct, in street or vicinity, tending to disparage plaintiff's business or his merchandise, 144 ALR 1181.

Use of property for production of war goods as affecting question of nuisance, and injunction to abate same, 145 ALR 611.

Supermarket, superstore, or public market as a nuisance, 146 ALR 1407.

Medical clinic as a nuisance, 153 ALR 972.

Zoning regulation as affecting question of nuisance within zoned area, 166 ALR 659.

Racing, or betting on races, as nuisance, 166 ALR 1264.

Attracting people in such numbers as to obstruct access to the neighboring premises, as nuisance, 2 ALR2d 437.

Coalyard as a nuisance, 8 ALR2d 419.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places, 10 ALR2d 627.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Stockyard as a nuisance, 18 ALR2d 1033.

Liability for injury to property occasioned by oil, water, or the like flowing from well, 19 ALR2d 1025.

Liability for injury on parking or strip between sidewalk and curb, 19 ALR2d 1053; 98 ALR3d 439.

Use of phonograph, loudspeaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance, 23 ALR2d 1289.

Dust as nuisance, 24 ALR2d 194; 79 ALR3d 253.

Tourist or trailer camp, motor court or motel, as nuisance, 24 ALR2d 571.

Private school as nuisance, 27 ALR2d 1249.

Quarries, gravel pits, and the like, as nuisances, 47 ALR2d 490.

Cemetery or burial ground as nuisance, 50 ALR2d 1324.

Public dump as nuisance, 52 ALR2d 1134.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Automobile sales lot or used car lot as nuisance, 56 ALR2d 776.

Attractive nuisance doctrine as applied to machine or machinery in motion other than vehicles, railroad cars, or streetcars, 62 ALR2d 898.

Golf course or driving range as a nuisance, 68 ALR2d 1331.

Contributory negligence or assumption of risk as defense to action for damages from nuisance — modern views, 73 ALR2d 1378.

Water sports, amusements, or exhibitions as nuisance, 80 ALR2d 1124.

Parking lot or place as nuisance, 82 ALR2d 413.

Practice of exacting usury as a nuisance or ground for injunction, 83 ALR2d 848.

Nonencroaching vegetation as a private nuisance, 83 ALR2d 936.

Automobile wrecking yard or place of business as nuisance, 84 ALR2d 653.

Oil refinery as a nuisance, 86 ALR2d 1322.

Liability of abutting owner or occupant for condition of sidewalk, 88 ALR2d 331.

Drive-in restaurant or cafe as nuisance, 91 ALR2d 572.

Dairy, creamery, or milk distributing plant, as nuisance, 92 ALR2d 974.

Drive-in theater or other outdoor dramatic or musical entertainment as nuisance, 93 ALR2d 1171.

Keeping pigs as a nuisance, 2 ALR3d 931.

Keeping poultry as nuisance, 2 ALR3d 965.

Motorbus or truck terminal as nuisance, 2 ALR3d 1372.

Electric generating plant or transformer station as nuisance, 4 ALR3d 902.

Saloons or taverns as nuisance, 5 ALR3d 989.

Keeping of dogs as enjoinal nuisance, 11 ALR3d 1399.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoinal nuisance, 21 ALR3d 1058.

Gun club, or shooting gallery or range, as nuisance, 26 ALR3d 661.

Keeping horses as nuisance, 27 ALR3d 627.

Children's playground as nuisance, 32 ALR3d 1127.

Billboards and other outdoor advertising signs as civil nuisance, 38 ALR3d 647.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance, 40 ALR3d 601.

Operation of incinerator as nuisance, 41 ALR3d 1009.

Laundry or drycleaning establishment as nuisance, 41 ALR3d 1236.

Automobile racetrack or drag strip as nuisance, 41 ALR3d 1273.

Residential swimming pool as nuisance, 49 ALR3d 545.

Public swimming pool as nuisance, 49 ALR3d 652.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 696.

Liability of oil and gas lessee or operator for injuries to or death of livestock, 51 ALR3d 304.

Absolute liability for blasting operations as extending to injury or damage not directly caused by debris or concussion from explosion, 56 ALR3d 1017.

Zoo as nuisance, 58 ALR3d 1126.

Pornoshops or similar places disseminating obscene materials as nuisance, 58 ALR3d 1134.

Interference with radio or television reception as nuisance, 58 ALR3d 1142.

Attractive nuisance doctrine as applied to trees, shrubs, and the like, 59 ALR3d 848.

Recovery of damages for emotional distress, fright, and the like, resulting from blasting operations, 75 ALR3d 770.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Fence as nuisance, 80 ALR3d 962.

Keeping bees as nuisance, 88 ALR3d 992.

Liability of swimming facility operator for injury to or death of trespassing child, 88 ALR3d 1197.

Liability for injury to or death of child from electric wire encountered while climbing tree, 91 ALR3d 616.

Liability for overflow of water confined or diverted for public power purposes, 91 ALR3d 1065.

Governmental liability from operation of zoo, 92 ALR3d 832.

Liability for injuries in connection with ice or snow on nonresidential premises, 95 ALR3d 15.

Bells, carillons, and the like, as nuisance, 95 ALR3d 1268.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from defect or obstruction on roadside parkway or parking strip, 98 ALR3d 439.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Funeral home as private nuisance, 8 ALR4th 324.

Windmill as nuisance, 36 ALR4th 1159.

Computer as nuisance, 45 ALR4th 1212.

Telephone calls as nuisance, 53 ALR4th 1153.

Tree or limb falling onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

Liability of private landowner for vegetation obscuring view at highway or street intersection, 69 ALR4th 1092.

Tort liability for pollution from underground storage tank, 5 ALR5th 1.

State and local government control of pollution from underground storage tanks, 11 ALR5th 388.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 25 ALR5th 568.

Tower or antenna as constituting nuisance, 88 ALR5th 641.

Keeping of domestic animal as consti-

tuting public or private nuisance, 90 ALR5th 619.

Sewage treatment plant as constituting nuisance, 92 ALR5th 517.

Nudity as constituting nuisance, 92 ALR5th 593.

Hog breeding, confining, or processing facility as constituting nuisance, 93 ALR5th 621.

Remedies for sewage treatment plant alleged or deemed to be nuisance, 101 ALR5th 287.

Municipal liability for damage resulting from obstruction or clogging of drain or sewer, 54 ALR6th 201.

41-1-2. Classes of nuisances; public and private nuisances defined.

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. (Orig. Code 1863, § 2939; Code 1868, § 2946; Code 1873, § 2997; Code 1882, § 2997; Civil Code 1895, § 3858; Civil Code 1910, § 4454; Code 1933, § 72-102.)

Cross references. — When infraction of public duty gives cause of action to individual, § 51-1-7.

Law reviews. — For article discussing federal liability for pollution abatement in condemnation actions, see 17 Mercer L. Rev. 364 (1966). For article discussing Georgia's practice of exposing municipalities to tort liability through the use of nuisance law, see 12 Ga. St. B.J. 11 (1975).

For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005) and 58 Mercer L. Rev. 267 (2006).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PRIVATE NUISANCE

PUBLIC NUISANCE

General Consideration

Notice before suit not required. — Action may be maintained for damages resulting from a nuisance, without notice or request to abate the nuisance. *Exley v. Southern Cotton Oil Co.*, 151 F. 101 (S.D. Ga. 1907).

Cited in *Justices of Inferior Court v. Griffin & W. Point Plank Rd. Co.*, 15 Ga. 39 (1854); *Ison v. Manley*, 76 Ga. 804 (1886); *Kavanagh v. Mobile & G.R.R.*, 78 Ga. 271, 2 S.E. 636 (1887); *Cannon v. Merry*, 116 Ga. 291, 42 S.E. 274 (1902);

Lofton v. Collins, 117 Ga. 434, 43 S.E. 708 (1903); *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903); *Edison v. Ramsey*, 146 Ga. 767, 92 S.E. 513 (1917); *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207, 6 ALR 1564 (1919); *Dean v. State*, 151 Ga. 371, 106 S.E. 792, 40 ALR 1132 (1921); *Town of Rentz v. Roach*, 154 Ga. 491, 115 S.E. 94 (1922); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938); *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948); *Isley v.*

General Consideration (Cont'd)

Little, 219 Ga. 23, 131 S.E.2d 623 (1963); Burgess v. Johnson, 223 Ga. 427, 156 S.E.2d 78 (1967); Miree v. United States, 526 F.2d 679 (5th Cir. 1976); Abee v. Stone Mt. Mem. Ass'n, 169 Ga. App. 167, 312 S.E.2d 142 (1983); Jones v. State, 265 Ga. 84, 453 S.E.2d 716 (1995); Moreland v. Cheney, 267 Ga. 469, 479 S.E.2d 745 (1997); Thompson v. City of Fitzgerald, 248 Ga. App. 725, 548 S.E.2d 368 (2001).

Private Nuisance

Definition. — "Private nuisance" is one limited in its injurious effect to one or a few individuals, which may injure either the person or property or both, and in either case a right of action accrues. Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313 (1957).

Mere violation of an ordinance does not create a private nuisance. Jillson v. Barton, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

Actionability of private nuisance. — Creation of a private nuisance is actionable, without regard to the question of negligence. Bonner v. Welborn, 7 Ga. 296 (1849); Exley v. Southern Cotton Oil Co., 151 F. 101 (S.D. Ga. 1907).

Public Nuisance

Extensive injuries not required. — Language in this section is not used in the sense that every person in the area must have been actually hurt or injured in order to show a public nuisance. Atlanta Processing Co. v. Brown, 227 Ga. 203, 179 S.E.2d 752 (1971).

All members of public not injured. — Trial court correctly entered summary judgment against the mothers on their public nuisance count because the evidence did not show that all members of the public who came into contact with the river were injured and, thus, the mother's public nuisance cause of action was effectively erased. During the decades prior to the deaths, no other person had ever drowned when entering the river via the boat ramp, whether during power generation or otherwise, and the other six boys who accompanied the decedents into the

water on the ramp that day were uninjured. White v. Ga. Power Co., 265 Ga. App. 664, 595 S.E.2d 353 (2004).

Because there was no evidence that a sewer line backup injured more than a few individuals who came into contact with it, it did not constitute a public nuisance, pursuant to O.C.G.A. § 41-1-2, and the four-year limitations period of O.C.G.A. § 9-3-30 applied to the nuisance claim brought by the property owners against a city. Davis v. City of Forsyth, 275 Ga. App. 747, 621 S.E.2d 495 (2005).

Gaming house. — Maintenance of a gaming house or a gaming place is a public nuisance. Gullatt v. State ex rel. Collins, 169 Ga. 538, 150 S.E. 825 (1929); Albany Theater, Inc. v. Short, 171 Ga. 57, 154 S.E. 895 (1930).

Street-flow obstructions. — Any permanent structure in a street which materially interferes with travel thereon is a public nuisance. City of East Point v. Henry Chanin Corp., 210 Ga. 628, 81 S.E.2d 812 (1954).

Disposal of chemicals. — Plaintiff's disposal of the plaintiff's chemicals at a specified site did not amount to creation of a public nuisance since: (1) any contamination of the property caused by the plaintiff did not affect a common right of all members of the public, such as the right to clean air or clean water, and (2) it was not shown that the rights of more than a few individuals were affected by the contamination. Briggs & Stratton Corp. v. Concrete Sales & Servs., 29 F. Supp. 2d 1372 (M.D. Ga. 1998).

Landing and steps of a church, though allegedly so negligently constructed as to be hazardous to life and limb, do not constitute a public nuisance since there is no right common to all of the public to use the steps and landing of a church of a particular denomination. Cox v. DeJarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961).

Plate glass doors. — Maintenance and operation of plate glass doors in public civic center was not public nuisance. Zellers v. Theater of Stars, Inc., 171 Ga. App. 406, 319 S.E.2d 553 (1984).

Barricades on a county road marking the approaches to the former site of a timber bridge spanning a railroad track

did not constitute a public nuisance. *Kitchen v. CSX Transp., Inc.*, 265 Ga. 206, 453 S.E.2d 712 (1995).

Defective condition of private street. — In view of evidence that a property owner's private road impeded the necessary passage of a city's emergency personnel so as to significantly endanger the health and safety of those persons residing at apartment complexes adjacent to the road, the owner was improperly granted summary judgment in the city's suit seeking abatement of a public nuisance under O.C.G.A. § 41-1-2. *City of College Park v. 2600 Camp Creek, LLC*, 293 Ga. App. 207, 666 S.E.2d 607 (2008).

Repeated violations with threats of continuing violations. — Constant and repeated violations of former statutes relating to the business of buying wages or salaries, and to the small-loan business, with threats to continue the businesses, do not amount to such a public nuisance as may be abated and prevented by a suit in the name of the state. *State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940).

Indictment for public nuisance. — Public nuisance is the subject of indictment; not of action. *South Carolina R.R. v. Moore & Philpot*, 28 Ga. 398, 73 Am. Dec. 778 (1859).

OPINIONS OF THE ATTORNEY GENERAL

Obstruction of crossing on public highway by railroad. — Public nuisance possibly occurs if a railroad blocks a crossing on a public highway for an unreasonable period of time; for such an action

to lie against a railroad, it must be shown that the particular act is an interference or annoyance to the public in the common use of public highways. 1970 Op. Att'y Gen. No. 70-58.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 33-39.

C.J.S. — 66 C.J.S., Nuisances, §§ 1, 7, 8, 9.

ALR. — Trolley poles in street as nuisance, 2 ALR 496.

Noise from operation of industrial plant as nuisance, 23 ALR 1407; 90 ALR 1207.

Nuisance by encroachment of walls or other parts of building on another's land as permanent or continuing, 29 ALR 839.

Amusement park as nuisance, 33 ALR 725.

Gas, water, or electric light plant as a nuisance, and the remedy therefor, 37 ALR 800.

Pesthouse or contagious disease hospital as nuisance, 48 ALR 518.

Aeroplanes and aeronautics, 99 ALR 173.

Legal aspects of radio communication and broadcasting, 124 ALR 982; 171 ALR 765.

Nuisance within contemplation of statute imposing upon municipality duty to keep streets and other public places free of "nuisance," as absolute nuisance or as

qualified nuisance, dependent upon negligence, 155 ALR 60.

Racing, or betting on races, as nuisance, 166 ALR 1264.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Liability for injury to property occasioned by oil, water, or the like flowing from well, 19 ALR2d 1025.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Automobile sales lot or used car lot as nuisance, 56 ALR2d 776.

Saloons or taverns as nuisance, 5 ALR3d 989.

Keeping of dogs as enjoined nuisance, 11 ALR3d 1399.

Children's playground as nuisance, 32 ALR3d 1127.

Public swimming pool as nuisance, 49 ALR3d 652.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Unsolicited mailing, distribution, house

call, or telephone call as invasion of privacy, 56 ALR3d 457.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 ALR3d 665.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Carwash as nuisance, 4 ALR4th 1308.

Funeral home as private nuisance, 8 ALR4th 324.

Tower or antenna as constituting nuisance, 88 ALR5th 641.

Keeping of domestic animal as constituting public or private nuisance, 90 ALR5th 619.

Sewage treatment plant as constituting nuisance, 92 ALR5th 517.

Nudity as constituting nuisance, 92 ALR5th 593.

Remedies for sewage treatment plant alleged or deemed to be nuisance, 101 ALR5th 287.

41-1-3. Right of action for public nuisance generally.

A public nuisance generally gives no right of action to any individual. However, if a public nuisance in which the public does not participate causes special damage to an individual, such special damage shall give a right of action. (Orig. Code 1863, §§ 2939, 2940; Code 1868, §§ 2946, 2947; Code 1873, §§ 2997, 2998; Code 1882, §§ 2997, 2998; Civil Code 1895, §§ 3858, 3859; Civil Code 1910, §§ 4454, 4455; Code 1933, § 72-103.)

Cross references. — Penalty for maintaining house in which gaming, drinking, or other misbehavior occurs, or which presents common disturbance to neighborhood, § 16-11-44. When infraction of public duty gives cause of action to individual, § 51-1-7.

Law reviews. — For article discussing Georgia's practice of exposing municipalities to tort liability through the use of nuisance law, see 12 Ga. St. B.J. 11 (1975).

For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

JUDICIAL DECISIONS

Right of action grows out of special injury. — Even though a given condition may constitute a public nuisance, a citizen suffering special damage by reason of sickness of the person or family, or depreciation of the person's property, as the result thereof, has a cause of action against the party creating or maintaining the nuisance. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Even though a given condition may constitute a public nuisance, a citizen suffering special damage has a cause of action against the person creating or maintain-

ing the condition. *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940).

Pleadings in civil action. — Even though it appeared that a homeowner's operation of an elevator in violation of departmental rules and regulations gave rise to a public nuisance under O.C.G.A. § 8-2-107(a), because the plaintiffs did not inform the defendant that the plaintiffs were relying on a nuisance theory until the plaintiffs moved for a directed verdict at the close of the evidence, the court did not err in denying the plaintiff's motion for directed verdict on a ground

not timely asserted. *Childers v. Monson*, 241 Ga. App. 70, 524 S.E.2d 326 (1999).

All injury to health is special, and necessarily limited in its effect to the individual affected, and is, in its nature, irreparable. It matters not that others within the sphere of the operation of the nuisance, whether public or private, may be affected likewise. *De Vaughn v. Minor*, 77 Ga. 809, 1 S.E. 433 (1887); *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

Necessity of showing special damages. — In order for an individual to abate a public nuisance it is necessary that the individual show special damages. *Moon v. Clark*, 192 Ga. 47, 14 S.E.2d 481 (1941).

Interference with egress to and ingress from highway. — Landowner may maintain a suit in equity to enjoin further interference with the landowner's means of egress to and ingress from the public highway, when such interference amounts to a continuing nuisance or trespass, and when an injunction would prevent a multiplicity of suits. *Barham v. Grant*, 185 Ga. 601, 196 S.E. 43 (1937).

Damages for one whose means of egress from and ingress to one's property abutting on a public highway is illegally and unnecessarily interfered with may be the depreciation in market value, if the obstruction is a permanent one, or the damage to business and loss of profits. Punitive damages may be recovered if the circumstances are such as to justify the allowance thereof. *Holland v. Shackelford*, 220 Ga. 104, 137 S.E.2d 298 (1964).

Plaintiff must allege special damage within petition. — Allegations of petition seeking to enjoin an alleged nuisance in operating an asphalt and cement-mixing and manufacturing plant as to the spilling of concrete and asphalt in a public street and its effect on persons walking along the street related to a public nuisance, and stating no special damage, showed no cause of action. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940).

Allegations of petition in which petitioners sought equitable relief "as individuals, citizens, and taxpayers" from the closing of a railroad crossing were insufficient to show special damage to petition-

ers, or any damage not shared equally by all other "individuals, citizens, and taxpayers," and the petition was therefore insufficient for the grant of any relief to the petitioners as individuals, citizens, and taxpayers. *State Hwy. Dep't v. Reed*, 211 Ga. 197, 84 S.E.2d 561 (1954).

Building of dam. — Right of a company to build a dam does not include a right to build or maintain the dam in such a negligent or improper manner as to cause a nuisance injurious to the health of the adjacent community. For damages arising from such things an action will lie. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Damages recoverable include injury to health. — In this state damages recoverable on account of a nuisance are not limited to injury to realty, but injury to health may furnish a basis for such recovery. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Municipality need not be joined as a party to an action to abate a nuisance which specially injured the plaintiff. *Trust Co. v. Ray*, 125 Ga. 485, 54 S.E. 145 (1906).

Right of action if road is obstructed. — To maintain an action for an injury received from an obstruction in a highway, two things must concur: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid the obstruction on the part of the plaintiff. *Branan v. May*, 17 Ga. 136 (1855).

If the owner of adjoining property suffers special damage from the unlawful running of cars in a public street, this entitled the owner to maintain an action. *Kavanagh v. Mobile & G.R.R.*, 78 Ga. 271, 2 S.E. 636 (1887).

If sickness results from the stagnation of a pool of water a cause of action exists. *Savannah, F. & W. Ry. v. Parish*, 117 Ga. 893, 45 S.E. 280 (1903).

Right of a municipality to grant a person the power to obstruct a street is dependent on legislative authority, hence, the unauthorized obstruction of a street furnishing an avenue of approach to one's place of business is actionable. *Coker v. Atlanta, K. & N. Ry.*, 123 Ga. 483, 51 S.E. 481 (1905); *Hendricks v. Jackson*, 143 Ga. 106, 84 S.E. 440 (1915).

Cited in *Vason v. South Carolina R.R.*, 42 Ga. 631 (1871); *Austin v. Augusta Term. Ry.*, 108 Ga. 671, 34 S.E. 852 (1899); *Sammons v. Sturgis*, 145 Ga. 663, 89 S.E. 774 (1916); *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919); *Knox v. Reese*, 149 Ga. 379, 100 S.E. 371 (1919); *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938); *Poole v. Arnold*, 187 Ga. 734, 2 S.E.2d 83 (1939);

Floyd v. City of Albany, 105 Ga. App. 31, 123 S.E.2d 446 (1961); *Save The Bay Comm., Inc. v. Mayor of Savannah*, 227 Ga. 436, 181 S.E.2d 351 (1971); *Brock v. Hall County*, 239 Ga. 160, 236 S.E.2d 90 (1977); *Stephens v. Tate*, 147 Ga. App. 366, 249 S.E.2d 92 (1978); *Brand v. Wilson*, 252 Ga. 416, 314 S.E.2d 192 (1984); *Rea v. Bunce*, 179 Ga. App. 628, 347 S.E.2d 676 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 212-217.

C.J.S. — 66 C.J.S., Nuisances, §§ 109-111.

ALR. — Trolley poles in street as nuisance, 2 ALR 496.

Right to enjoin threatened or anticipated nuisance, 32 ALR 724; 55 ALR 880.

Gas, water, or electric light plant as a nuisance, and the remedy therefor, 37 ALR 800.

Automobile gas filling or supply station as a nuisance, 124 ALR 383.

Liability of private persons or corporations draining into sewer maintained by municipality or other public body for damage to riparian owners or others, 170 ALR 1192.

Attracting people in such numbers as to obstruct access to the neighboring premises, as nuisance, 2 ALR2d 437.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Sewage disposal plant as nuisance, 40 ALR2d 1177.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Liability of abutting owner or occupant for condition of sidewalk, 88 ALR2d 331.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Saloons or taverns as nuisance, 5 ALR3d 989.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Liability for injury or damage caused by rocket testing or firing, 29 ALR3d 556.

Children's playground as nuisance, 32 ALR3d 1127.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Public swimming pool as nuisance, 49 ALR3d 652.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Liability of swimming facility operator for injury to or death of diver allegedly resulting from hazardous condition in water, 85 ALR3d 750.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

What constitutes special injury that entitles private party to maintain action based on public nuisance — modern cases, 71 ALR4th 13.

Remedies for sewage treatment plant alleged or deemed to be nuisance, 101 ALR5th 287.

41-1-4. Right of action for private nuisance generally.

A private nuisance may injure either a person or property, or both, and for that injury a right of action accrues to the person who is injured or whose property is damaged. (Orig. Code 1863, §§ 2939, 2941; Code

1868, §§ 2946, 2948; Code 1873, §§ 2997, 2999; Code 1882, §§ 2997, 2999; Civil Code 1895, §§ 3858, 3860; Civil Code 1910, §§ 4454, 4456; Code 1933, § 72-104.)

Law reviews. — For note discussing nuisance action as a remedy for damage caused by sonic booms, see 2 Ga. L. Rev. 83 (1967). For note, "Town of Fort

Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969).

JUDICIAL DECISIONS

Coming to a nuisance. — Old rule, maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded. *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

One who purchases land adjoining a private nuisance may abate it. *City of Rentz v. Roach*, 154 Ga. 491, 115 S.E. 94 (1922).

Charge that plaintiffs had the right to move near a kennel though the plaintiffs knew the kennel was a nuisance, and could rely on the presumption that the nuisance would be abated and stopped, was not erroneous. *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

Nonowner lacked standing. — Party could not prevail on the party's claim for continuing private nuisance since the party sold the property at issue and did not own the property during any part of the four years preceding the filing of the action. *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 29 F. Supp. 2d 1372 (M.D. Ga. 1998).

Recovery for both personal and property damage. — Damages for discomfort and annoyance caused to the owner and the owner's family are separate and distinct from damage to the value of the realty and do not constitute a double recovery for a single injury. In an action for nuisance, the property owners may recover for both damage to person and damage to property. *City of Atlanta v. Murphy*, 194 Ga. App. 652, 391 S.E.2d 474 (1990); *Arvida/JMB Partners v. Hadaway*, 227 Ga. App. 335, 489 S.E.2d 125 (1997).

Since the owners' evidence of repeated flooding established an abatable nuisance, an award of both personal and property

damages as well as attorney's fees was adequate; the trial court's jury charge was proper and the court did not abuse the court's discretion in denying a directed verdict or a judgment notwithstanding the verdict. *City of Gainesville v. Waters*, 258 Ga. App. 555, 574 S.E.2d 638 (2002).

In a nuisance suit brought by a property owner against the City of Atlanta, involving the city failing to properly maintain a storm pipe that traversed and served the property owner's land which resulted in extensive flooding of the land and the home, the trial court properly awarded compensatory damages in the amount of \$300,000 and that amount was not excessive, as a matter of law, as there was evidence that the property owner suffered special damages in the amount of \$203,376, including loss of personal property, diminution in the value of the property, and rental expenses incurred when the property owner was forced to move from the home. There was also sufficient evidence to support an award of damages for personal injuries and damages for annoyance and discomfort. *City of Atlanta v. Hofrichter*, 291 Ga. App. 883, 663 S.E.2d 379 (2008).

Damages not excessive. — Because the jury heard evidence of the defendant's interference with plaintiff's right to enjoy possession of the plaintiff's property and the plaintiff's discomfort and annoyance and the unobjected to jury form specifically authorized general damages, the trial court did not abuse the court's discretion in rejecting the claim of excessiveness. *Woodmen of the World v. Jordan*, 231 Ga. App. 517, 499 S.E.2d 900 (1998).

Landowners of a lakefront property created a nuisance when they went onto a corporation's dam and plugged the weak-

ened dam to prevent a lake from draining. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Inverse condemnation for nuisance. — Summary judgment was properly granted to a county on an inverse condemnation claim filed by four property owners as the county did not either create or maintain a construction project that allegedly created a nuisance that harmed the owners since a city owned and maintained the nuisance property, the county exercised no control over the properties, and the county could not be deemed to have performed a continuous act that caused the owners' harm; while the county

bid out the construction contract, the county had no role in designing the plans for the contractor to use on the project or in supervising the contractor's work and the owners did not show that the county official performed any action beyond passing on an inquiry between the Georgia Department of Transportation and the city. *Reidling v. City of Gainesville*, 280 Ga. App. 698, 634 S.E.2d 862 (2006).

Cited in *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Scott v. Reynolds*, 70 Ga. App. 545, 29 S.E.2d 88 (1944); *Southeastern Liquid Fertilizer Co. v. Chapman*, 103 Ga. App. 773, 120 S.E.2d 651 (1961); *Turner v. Ross*, 115 Ga. App. 507, 154 S.E.2d 798 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 212-216, 226, 227.

C.J.S. — 66 C.J.S., Nuisances, §§ 112-115.

ALR. — Effect of delay in seeking equitable relief against nuisance, 6 ALR 1098.

Right to enjoin threatened or anticipated nuisance, 32 ALR 724; 55 ALR 880.

Oil as nuisance; liability for damage to adjoining property, 60 ALR 483.

Automobile gas filling or supply station as a nuisance, 124 ALR 383.

Legal aspects of radio communication and broadcasting, 124 ALR 982; 171 ALR 765.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages depreciation in value of property or its use, 142 ALR 1307.

Injunction against acts or conduct, in street or vicinity, tending to disparage plaintiff's business or his merchandise, 144 ALR 1181.

Supermarket, superstore, or public market as a nuisance, 146 ALR 1407.

Liability of private persons or corporations draining into sewer maintained by municipality or other public body for damage to riparian owners or others, 170 ALR 1192.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 ALR2d 302.

Casting of light on another's premises as constituting actionable wrong, 5 ALR2d 705; 79 ALR3d 253.

Fire as attractive nuisance, 27 ALR2d 1187.

Private school as nuisance, 27 ALR2d 1249.

Liability of landowner for injury to or death of child caused by cave-in or landslide, 28 ALR2d 195.

Liability of landowner for injury to or death of child resulting from piled or stacked lumber or other building materials, 28 ALR2d 218.

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable, 41 ALR2d 1064.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Rule of municipal immunity from liability for acts in performance of governmental functions as applicable to personal injury or death as result of a nuisance, 56 ALR2d 1415.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Nonencroaching vegetation as a private nuisance, 83 ALR2d 936.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 ALR3d 1027.

Residential swimming pool as nuisance, 49 ALR3d 545.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Operation of cement plant as nuisance, 82 ALR3d 1004.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Funeral home as private nuisance, 8 ALR4th 324.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

41-1-5. Right of action of alienee of injured property for continuance of nuisance; necessity for request to abate nuisance.

(a) The alienee of a person owning property injured may maintain an action for continuance of the nuisance for which the alienee of the property causing the nuisance is responsible.

(b) Prior to commencement of an action by the alienee of the property injured against the alienee of the property causing the nuisance, there must be a request to abate the nuisance. (Code 1863, § 2943; Code 1868, § 2950; Code 1873, § 3001; Code 1882, § 3001; Civil Code 1895, § 3862; Civil Code 1910, § 4458; Code 1933, § 72-105; Ga. L. 1991, p. 94, § 41.)

Cross references. — Covenants and warranties relating to land transactions generally, § 44-5-60 et seq.

Law reviews. — For article discussing

nuisances as “Hidden Liens,” see 14 Ga. St. B.J. 32 (1977). For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NOTICE OF EXISTENCE OF NUISANCE

General Consideration

This section is a codification of the common law. *Bonner v. Welborn*, 7 Ga. 296 (1849); *Roberts v. Georgia Ry. & Power Co.*, 151 Ga. 241, 106 S.E. 258 (1921).

Section inapplicable when alienee induces original injury. — This section does not apply when the original injury was caused by the alienee, hence, no notice to abate is necessary. *Southern Ry. v. Puckett*, 121 Ga. 322, 48 S.E. 968 (1904); *Davis v. Beard*, 202 Ga. App. 784, 415 S.E.2d 522 (1992).

Duty required. — There must be a duty to abate a nuisance before liability for the maintenance of a continuing nuisance may attach. *Bradford Square Condo. Ass’n v. Miller*, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

Lessee of property was liable for damages from continuing contamination the lessee originally caused, and the fact that the lessee had vacated the premises would not remove the lessee’s legal duty to abate the nuisance the lessee caused and which continued within four years of plaintiffs’ action. *Smith v. Branch*, 226 Ga. App. 626, 487 S.E.2d 35 (1997).

General Consideration (Cont'd)

Cited in *Phinizy v. City Council*, 47 Ga. 266 (1872); *Felker v. Calhoun*, 64 Ga. 514 (1880); *Williams v. Southern Ry.*, 140 Ga. 713, 79 S.E. 850 (1913); *Smith v. Central of Ga. Ry.*, 22 Ga. App. 572, 96 S.E. 570 (1918); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Martin v. Medlin*, 83 Ga. App. 589, 64 S.E.2d 73 (1951); *Shaheen v. G & G Corp.*, 230 Ga. 646, 198 S.E.2d 853 (1973); *Crowe v. Coleman*, 113 F.3d 1536 (11th Cir. 1997); *West v. CSX Transp., Inc.*, 230 Ga. App. 872, 498 S.E.2d 67 (1998); *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009).

Notice of Existence of Nuisance

Notice of existence or request for abatement must be given alienee. — Notice to an alienee that the alienee will be held responsible for any damages subsequently caused by the nuisance will suffice in lieu of a specific request to abate. *Central R.R. v. English*, 73 Ga. 366 (1884); *Central of Ga. Ry. v. Americus Constr. Co.*, 133 Ga. 392, 65 S.E. 855 (1909).

It is error to charge that a lessee need not receive notice when the evidence conflicted on the question of whether the lessee had increased the nuisance. *Seaboard & R.R.R. v. Ambrose*, 122 Ga. 47, 49 S.E. 815 (1905).

Before a cause of action for maintenance of a nuisance arises against alienee of nuisance, there must be a notice of the existence of the nuisance, or a request to abate the nuisance, given to alienee; mere passive knowledge of the existence of the nuisance by alienee is not sufficient. *Georgia Power Co. v. Fincher*, 46 Ga. App. 524, 168 S.E. 109 (1933).

While an action will lie without notice against one who erects and maintains a nuisance, notice is a prerequisite against one who merely acquires property on which there is an existing nuisance, passively permits the nuisance's continuance, and adds nothing thereto. *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933).

Maintenance of the nuisance after notice is continuance of the nuisance, and the alienee of the property causing the

nuisance is responsible for that continuance, if there is a request for abatement before action is filed. *Hoffman v. Atlanta Gas Light Co.*, 206 Ga. App. 727, 426 S.E.2d 387 (1992).

Trial court correctly determined that a property owner's failure to provide ante litem notice to an apartment owner prohibited the property owner from pursuing nuisance claims because, pursuant to O.C.G.A. § 41-1-5(b), the property owner was required to provide the apartment owner with notice of the nuisance or a request to abate prior to filing suit unless it did anything to increase the nuisance; the apartment owner acquired the property after detention ponds had been built and after storm water runoff from the property had already become problematic on the property owner's land, and the property owner presented no evidence that the apartment altered the property or took any other affirmative action to increase the nuisance. *Haarhoff v. Jefferson at Perimeter L.P.*, 315 Ga. App. 271, 727 S.E.2d 140 (2012).

Damages prior to notice cannot be recovered. *City Council v. Marks*, 124 Ga. 365, 52 S.E. 539 (1905); *Roberts v. Georgia Ry. & Power Co.*, 151 Ga. 241, 106 S.E. 258 (1921).

Any damages accruing prior to notice are not recoverable. — *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

Notice of abatement when alienee increases nuisance. — Grantee or alienee of property causing a nuisance is not liable for damages caused by its continued maintenance and accruing prior to a notice or request to abate; but it is also the rule that when the alienee of property on which is situated a nuisance does anything to increase the nuisance, the alienee may be sued without notice to abate. *Savannah Elec. & Power Co. v. Horton*, 44 Ga. App. 578, 162 S.E. 299 (1932).

While notice is required to one who merely purchases land and fails to remove a nuisance created by another, yet it is not necessary to an alienee, who knowingly does some additional act to actively maintain and use a nuisance originally created

by another, or does something to increase the existing nuisance or its injurious effects, and thus creates in effect a fresh nuisance. *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933).

Notice not sufficient. — Letters to homeowners were legally insufficient to give the required notice to abate a nuisance caused by the allegedly undersized drainage pipes; letter stated city blamed homeowners for not maintaining pipes and that if further litigation was necessary the homeowners could be named as parties. *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

No duty to move away. — When a person rents land which is adjacent to a nuisance, one is under no duty to move away. *Central R.R. v. English*, 73 Ga. 366 (1884).

Jury instruction on imputed notice of nuisance. — Upon the trial of a suit against alienee of a nuisance to recover damages for maintenance of the nuisance, which arises out of the construction of the dam which alienee's predecessor in title had erected, and which alienee had not altered, it was error for the court to instruct jury that, if the agent of the defendant in charge of the dam as superintendent is the same person who had held the same position with the defendant's predecessor in title, and who, as superintendent for latter, had notice of the existence of the nuisance, knowledge by one of this fact

constituted notice to the defendant of the existence of the nuisance. *Georgia Power Co. v. Fincher*, 46 Ga. App. 524, 168 S.E. 109 (1933).

Property purchased with knowledge of nuisance. — Purchaser of property upon which there is an existing nuisance is not barred from the purchaser's right to recover damages resulting from a continuation of the nuisance by the defendant, after requesting the defendant to abate the nuisance, by the fact that the purchaser purchased the property with knowledge of the nuisance. *Roughton v. Thiele Kaolin Co.*, 209 Ga. 577, 74 S.E.2d 844 (1953).

Owner or lessee of land although taking with knowledge of a nuisance, has a right to presume that, being illegal, the nuisance will be abated; and, if it is not, one may sue for damages resulting to the owner or lessee therefrom. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

Measure of damages. *Mayor of Gainesville v. Robertson*, 25 Ga. App. 632, 103 S.E. 853 (1920).

Notice to the alienee cannot be set up by an amendment. *Blackstock v. Southern Ry.*, 120 Ga. 414, 47 S.E. 902 (1904).

Variance between allegations and proof. — Allegations that damage was caused by the erection of a nuisance by the defendant are not supported by evidence that it was erected by the predecessor in title. *Southern Ry. v. Cook*, 106 Ga. 450, 32 S.E. 585 (1899); *DeLoach v. Georgia C. & P.R.R.*, 137 Ga. 633, 73 S.E. 1072 (1912).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 101, 103, 216.

C.J.S. — 66 C.J.S., Nuisances, §§ 107, 108, 220 et seq.

ALR. — Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Landowner's right to relief against pol-

lution of his water supply by industrial or commercial waste, 39 ALR3d 910.

"Coming to nuisance" as a defense or estoppel, 42 ALR3d 344.

Residential swimming pool as nuisance, 49 ALR3d 545.

Computer as nuisance, 45 ALR4th 1212.

41-1-6. Erection or continuance of nuisance after notice to abate.

Any person who shall erect or continue after notice to abate a nuisance which tends to annoy the community, injure the health of the citizens in general, or corrupt the public morals shall be guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 4437; Code 1868, § 4478; Code 1873, § 4562; Code 1882, § 4562; Penal Code 1895, § 641; Penal Code 1910, § 681; Code 1933, § 72-9901.)

Cross references. — Offenses against public health and morals generally, T. 16, C. 12.

JUDICIAL DECISIONS

City criminal court empowered to abate nuisances. — Fact that the General Assembly made the continuation of a nuisance after notice to abate a misdemeanor, does not preclude the criminal court of Cordele's power to abate nuisances pursuant to the legislative authorization in O.C.G.A. § 41-2-5, and its

power to enforce the court's judgments by contempt pursuant to the legislative authorization in the city charter. *Horne v. City of Cordele*, 254 Ga. 346, 329 S.E.2d 134 (1985).

Cited in *Vason v. City of Augusta*, 38 Ga. 542 (1868); *City of Atlanta v. Pazol*, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

OPINIONS OF THE ATTORNEY GENERAL

Substandard buildings in town or city. — If substandard buildings in a town or city were alleged to be a nuisance, this may be determined in accordance with former Code 1933, § 72-401 (see now O.C.G.A. § 41-2-5); this determination must be made subject to the due process provisions of the state and federal Constitutions; if a nuisance was found to exist,

the court could order the nuisance's abatement; if the property owner failed to abate the nuisance, the owner may be bound over to a court having jurisdiction of misdemeanors; the municipality cannot itself demolish the offending buildings unless the municipality condemns the property and compensates the owner. 1970 Op. Att'y Gen. No. U70-229.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 191, 192, 300, 301.

C.J.S. — 66 C.J.S., Nuisances, §§ 118-120, 200 et seq.

ALR. — Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

41-1-7. Treatment of agricultural facilities and operations and forest land as nuisances.

(a) It is the declared policy of the state to conserve, protect, and encourage the development and improvement of its agricultural and forest land and facilities for the production or distribution of food and other agricultural products, including without limitation forest products. When nonagricultural land uses extend into agricultural or agriculture-supporting industrial or commercial areas or forest land or when there are changed conditions in or around the locality of an agricultural facility or agricultural support facility, such operations often become the subject of nuisance actions. As a result, such facilities are sometimes forced to cease operations. Many others are discouraged from making investments in agricultural support facilities or farm improvements or adopting new related technology or methods. It is the purpose of this Code section to reduce losses of the state's agricultural and forest land resources by limiting the circumstances under which agricultural facilities and operations or agricultural support facilities may be deemed to be a nuisance.

(b) As used in this Code section, the term:

(1) "Agricultural area" means any land which is, or may be, legally used for an agricultural operation under applicable zoning laws, rules, and regulations at the time of commencement of the agricultural operation of the agricultural facility at issue and throughout the first year of operation of such agricultural facility. Any land which is not subject to zoning laws, rules, and regulations at the time of commencement of an agricultural operation of an agricultural facility and throughout the first year of operation of such agricultural facility shall be deemed an "agricultural area" for purposes of this Code section.

(2) "Agricultural facility" includes, but is not limited to, any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, livestock, animals, poultry, honeybees, honeybee products, livestock products, poultry products, timber, forest products, or products which are used in commercial aquaculture. Such term shall also include any farm labor camp or facilities for migrant farm workers.

(3) "Agricultural operation" means:

(A) The plowing, tilling, or preparation of soil at an agricultural facility;

(B) The planting, growing, fertilizing, harvesting, or otherwise maintaining of crops as defined in Code Section 1-3-3 and also

timber and trees that are grown for purposes other than for harvest and for sale;

(C) The application of pesticides, herbicides, or other chemicals, compounds, or substances to crops, weeds, or soil in connection with the production of crops, timber, livestock, animals, or poultry;

(D) The breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock, hogs, equines, chickens, turkeys, poultry or other fowl normally raised for food, mules, cattle, sheep, goats, dogs, rabbits, or similar farm animals for commercial purposes;

(E) The production and keeping of honeybees, the production of honeybee products, and honeybee processing facilities;

(F) The production, processing, or packaging of eggs or egg products;

(G) The manufacturing of feed for poultry or livestock;

(H) The rotation of crops, including without limitation timber production;

(I) Commercial aquaculture;

(J) The application of existing, changed, or new technology, practices, processes, or procedures to any agricultural operation; and

(K) The operation of any roadside market.

(3.1) "Agricultural support facility" means any food processing plant or forest products processing plant together with all related or ancillary activities, including trucking; provided, however, that this term expressly excludes any rendering plant facility or operation.

(4) "Changed conditions" means any one or more of the following:

(A) Any change in the use of land in an agricultural area or in an industrial or commercial area affecting an agricultural support facility;

(B) An increase in the magnitude of an existing use of land in or around the locality of an agricultural facility or agricultural support facility and includes, but is not limited to, urban sprawl into an agricultural area or into an industrial or commercial area in or around the locality of such facility, or an increase in the number of persons making any such use, or an increase in the frequency of such use; or

(C) The construction or location of improvements on land in or around the locality of an agricultural facility or agricultural sup-

port facility closer to such facility than those improvements located on such land at the time of commencement of the agricultural or agricultural support operation or the agricultural facility or agricultural support facility at issue and throughout the first year of operation of said facility.

(4.1) "Food processing plant" means a commercial operation that manufactures, packages, labels, distributes, or stores food for human consumption and does not provide food directly to a consumer.

(4.2) "Forest products processing plant" means a commercial operation that manufactures, packages, labels, distributes, or stores any forest product or that manufactures, packages, labels, distributes, or stores any building material made from gypsum rock.

(4.3) "Rendering plant" has the meaning provided by Code Section 4-4-40.

(5) "Urban sprawl" means either of the following or both:

(A) With regard to an agricultural area or agricultural operation:

(i) The conversion of agricultural areas from traditional agricultural use to residential use; or

(ii) An increase in the number of residences in an agricultural area which increase is unrelated to the use of the agricultural area for traditional agricultural purposes.

(B) With regard to an agricultural support facility:

(i) The conversion of industrial or commercial areas to residential use; or

(ii) An increase in the number of residences in an industrial or commercial area which increase is unrelated to the use of the industrial or commercial area for traditional industrial or commercial purposes.

(c) No agricultural facility, agricultural operation, any agricultural operation at an agricultural facility, agricultural support facility, or any operation at an agricultural support facility shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such facility or operation if the facility or operation has been in operation for one year or more. The provisions of this subsection shall not apply when a nuisance results from the negligent, improper, or illegal operation of any such facility or operation.

(d) For purposes of this Code section, the established date of operation is the date on which an agricultural operation or agricultural

support facility commenced operation. If the physical facilities of the agricultural operation or the agricultural support facility are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and the commencement of the expanded operation does not divest the agricultural operation or agricultural support facility of a previously established date of operation. (Ga. L. 1980, p. 1253, §§ 1, 2; Ga. L. 1988, p. 1775, § 1; Ga. L. 1989, p. 317, § 1; Ga. L. 2002, p. 817, § 1; Ga. L. 2004, p. 681, § 1; Ga. L. 2007, p. 267, § 1/SB 101.)

Cross references. — Legislative declaration of intent to encourage development and operation of new family farms through establishment of Georgia Residential Finance Authority, § 8-3-171.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, the correct spelling of “technology” was substituted in the second sentence of subsection (d).

Pursuant to Code Section 28-9-5, in 2004, “however, that this” was substituted for “however, this” paragraph (b)(3.1).

Law reviews. — For article, “Agricultural Nuisances and the Georgia ‘Right to Farm’ Law,” see 23 Ga. St. B.J. 19 (1986). For article, “Agricultural Nuisances Under the Amended Georgia ‘Right-to-Farm’ Law,” see 25 Ga. St. B.J. 36 (1988).

JUDICIAL DECISIONS

“Changed conditions in the locality” construed. — Language in subsection (c) of O.C.G.A. § 41-1-7 “changed conditions in ... the locality” of the facility refers solely to extension of nonagricultural land uses, residential or otherwise, into existing agricultural areas. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

Changed conditions in locality. — Since the plaintiffs were making nonagricultural uses of the plaintiffs’ lands prior to establishment of the defendants’ farm, if the defendants’ facility is a nuisance, it is not so as a result of changed conditions in locality. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

Determination of whether facility is insulated from abatement. — In determining whether agricultural facility is insulated from abatement as a nuisance, the court must inquire: (1) whether operation is an agricultural facility within meaning of section; (2) whether a nuisance action is being brought as a result of

changed conditions in locality of facility; and (3) whether facility has been in operation for one year or more prior to changed conditions in surrounding locality. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

Nuisances not arising from urban sprawl are not covered. — That which may constitute a nuisance regardless of urban sprawl, such as polluting a stream, is never protected by O.C.G.A. § 41-1-7 since such activity does not become a nuisance as a result of changed conditions in surrounding locality. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

Abatement of facilities in operation for long periods. — O.C.G.A. § 41-1-7 does not provide that a facility in operation for one year can never be abated as nuisance. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

Cited in *Roberts v. Southern Wood Piedmont Co.*, 173 Ga. App. 757, 328 S.E.2d 391 (1985).

OPINIONS OF THE ATTORNEY GENERAL

Egg farm located in nuisance suits. 1980 Op. Att'y Gen. No. U80-51.
nonagricultural, residential area
 would not be entitled to protection from

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 153, 154, 159, 160, 163, 169. **ALR.** — Hog breeding, confining, or processing facility as constituting nuisance, 93 ALR5th 621.
C.J.S. — 66 C.J.S., Nuisances, §§ 13-25, 50, 104.

41-1-8. Treatment of publicly owned cultural facilities as nuisances.

(a) It is declared the public policy of this state to conserve, protect, and encourage the development of publicly owned cultural facilities. In order to encourage the establishment and maintenance of publicly owned cultural facilities, it is the purpose of this Code section to limit the circumstances under which a publicly owned cultural facility may be deemed to be a nuisance.

(b) Neither a publicly owned cultural facility nor a facility operated on lease from a publicly owned cultural facility nor any of the appurtenances thereof nor the operation thereof shall be or become a nuisance, either public or private, solely as a result of changed conditions in or around the locality of such cultural facility if such cultural facility has been in operation for one year or more. (Code 1981, § 41-1-8, enacted by Ga. L. 1987, p. 999, § 1; Ga. L. 1994, p. 97, § 41.)

41-1-9. Sport shooting ranges.

(a) As used in this Code section, the term:

(1) "Person" means an individual, proprietorship, partnership, corporation, or unincorporated association.

(2) "Sport shooting range" or "range" means an area designated and operated by a person for the sport shooting of firearms and not available for such use by the general public without payment of a fee, membership contribution, or dues or by invitation of an authorized person, or any area so designated and operated by a unit of government, regardless of the terms of admission thereto.

(3) "Unit of government" means any of the departments, agencies, authorities, or political subdivisions of the state, cities, municipal corporations, townships, or villages and any of their respective departments, agencies, or authorities.

(b) No sport shooting range shall be or shall become a nuisance, either public or private, solely as a result of changed conditions in or around the locality of such range if the range has been in operation for one year since the date on which it commenced operation as a sport shooting range. Subsequent physical expansion of the range or expansion of the types of firearms in use at the range shall not establish a new date of commencement of operations for purposes of this Code section.

(c) No sport shooting range or unit of government or person owning, operating, or using a sport shooting range for the sport shooting of firearms shall be subject to any action for civil or criminal liability, damages, abatement, or injunctive relief resulting from or relating to noise generated by the operation of the range if the range remains in compliance with noise control or nuisance abatement rules, regulations, statutes, or ordinances applicable to the range on the date on which it commenced operation.

(d) No rules, regulations, statutes, or ordinances relating to noise control, noise pollution, or noise abatement adopted or enacted by a unit of government shall be applied retroactively to prohibit conduct at a sport shooting range, which conduct was lawful and being engaged in prior to the adoption or enactment of such rules, regulations, statutes, or ordinances. (Code 1981, § 41-1-9, enacted by Ga. L. 1997, p. 796, § 1.)

Editor's notes. — Ga. L. 1997, p. 796, § 2, not codified by the General Assembly, makes this Code section applicable to conduct occurring on or after July 1, 1997,

and provides that this Code section shall not apply to or affect conduct occurring prior to July 1, 1997.

JUDICIAL DECISIONS

No injunction as a nuisance. — Sporting clay course cannot be enjoined as a sound generating nuisance if the course does not run afoul of local noise control

ordinances or ordinances aimed at the regulation of a sport shooting range. *Jenkins v. Clayton*, 273 Ga. 439, 542 S.E.2d 503 (2001).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Citizen Suit Under the Noise Control Act, 58 POF3d 315.

41-1-10. Hunting operations not nuisances under certain conditions.

(a) As used in this Code section, the term “hunting operation” means an operation including any of the following:

(1) Lands, including the buildings and improvements thereon, which are used or which are intended for use as a hunting club, hunting preserve, or shooting preserve;

(2) Lands, including the buildings and improvements thereon, which are used or which are intended for use as a kennel, training facility, or field trial facility for the breeding, showing, raising or training of hunting and sporting dogs; or

(3) Clubs, associations, partnerships, sole proprietorships, corporations and other business and social entities whose activities or holdings include the lands and uses described in paragraphs (1) and (2) of this subsection.

(b) No hunting operation shall be or shall become a nuisance, either public or private, solely as a result of changed conditions in or around the locality of such hunting operation if the hunting operation has been in operation for at least one year since the date on which it commenced activity as a hunting operation. Subsequent physical expansion of the hunting operation shall not establish a new date of commencement of activity for purposes of this Code section.

(c) No hunting operation shall be subject to any action for civil or criminal liability, damages, abatement, or injunctive relief resulting from or relating to lawful hunting activities generated by the hunting operation if the hunting operation remains in compliance with Title 27 and the rules and regulations adopted by the Board of Natural Resources pursuant to Title 27.

(d) This Code section shall not apply to hunting operations which are conducted in violation of any provision of Title 27 or the rules and regulations adopted by the Board of Natural Resources pursuant to Title 27. (Code 1981, § 42-1-10, enacted by Ga. L. 2010, p. 952, § 11/SB 474.)

Editor's notes. — This Code section formerly pertained to signs for privately owned businesses. The former Code section was based on Code 1981, § 41-1-10,

enacted by Ga. L. 2001, p. 1196, § 5.1 and was repealed by Ga. L. 2002, p. 415, § 41, effective April 18, 2002.

CHAPTER 2

ABATEMENT OF NUISANCES GENERALLY

Sec.		Sec.	
41-2-1.	Authorization and procedure for abatement of nuisances generally.		that dwelling, building, or structure is unfit or vacant, dilapidated, and being used in connection with the commission of drug crimes.
41-2-2.	Filing of complaint to abate public nuisance.	41-2-11.	Powers of public officers in regard to unfit buildings or structures.
41-2-3.	Filing of petition to abate private nuisance.	41-2-12.	Service of complaints or orders upon parties in interest and owners of unfit buildings or structures.
41-2-4.	Issuance of injunction where nuisance about to be erected or commenced likely to result in irreparable damage.	41-2-13.	Injunctions against order to repair, close, or demolish unfit buildings or structures.
41-2-5.	Authorization and procedure for abatement of nuisances in cities and unincorporated areas of counties.	41-2-14.	Taking of unfit buildings or structures by eminent domain; police power.
41-2-6.	Notice of meeting to determine question of abatement [Repealed].	41-2-15.	Authority to use revenues, grants, and donations to repair, close, or demolish unfit buildings or structures.
41-2-7.	Power of counties and municipalities to repair, close, or demolish unfit buildings or structures; health hazards on private property; properties affected.	41-2-16.	Construction of Code Sections 41-2-7 through 41-2-17 with county or municipal local enabling Act, charter, and other laws, ordinances, and regulations.
41-2-8.	Definitions for use in Code Sections 41-2-7 through 41-2-17.	41-2-17.	Prior ordinances relating to repair, closing, or demolition of unfit buildings or structures.
41-2-9.	County or municipal ordinances relating to unfit buildings or structures.		
41-2-10.	Determination by public officer		

Cross references. — Abatement of nuisances relating to manufacture, sale, and other activities concerning of distilled spirits in dry counties and municipalities, § 3-10-8. Institution of action for injunc-

tion, mandamus, to prevent, correct, or abate violation or threatened violation of county building, electrical, and other codes, § 36-13-10.

JUDICIAL DECISIONS

This chapter furnishes a summary remedy for the abatement of nuisances, public or private, and such remedy should be resorted to unless the facts make it inadequate. *Powell v. Foster*, 59 Ga. 790 (1877); *Broomhead v. Grant*, 83 Ga. 451, 10 S.E. 116 (1889); *Hendricks v.*

Jackson, 143 Ga. 106, 84 S.E. 440 (1915); *Simmons v. Lindsay*, 144 Ga. 845, 88 S.E. 199 (1916).

Procedure provided for in this chapter is the proper remedy when the sole relief sought by the plaintiff is the removal of obstructions in a public alley or street

placed there by the defendant. *Barnes v. Cheek*, 84 Ga. App. 653, 67 S.E.2d 145 (1951).

Necessity of actual existence of nuisance. — This chapter was not intended to afford a remedy against that which is not an actually existing nuisance, as distinguished from that which may or probably will become such. The statutory language seems to admit of no other

construction. *Fairview Cem. Co. v. Wood*, 36 Ga. App. 709, 138 S.E. 88 (1927).

Cited in *Haney v. Sheppard*, 207 Ga. 158, 60 S.E.2d 453 (1950); *Atkinson v. Drake*, 212 Ga. 558, 93 S.E.2d 702 (1956); *Speight v. Slaton*, 415 U.S. 333, 94 S. Ct. 1098, 39 L. Ed. 2d 367 (1974); 660 *Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980).

RESEARCH REFERENCES

ALR. — When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 ALR4th 456.

41-2-1. Authorization and procedure for abatement of nuisances generally.

Upon filing of a petition as provided in Code Section 41-2-2, any nuisance which tends to the immediate annoyance of the public in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the public may be abated by order of a judge of the superior court of the county in which venue is proper. (Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 3995; Code 1868, § 4023; Code 1873, § 4094; Code 1882, § 4094; Civil Code 1895, § 4760; Civil Code 1910, § 5329; Code 1933, § 72-201; Ga. L. 1980, p. 620, § 1; Ga. L. 1981, p. 867, § 1.)

Cross references. — Abatement of hazard resulting from abandoned well or hole, § 44-1-14.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SUFFICIENCY OF ALLEGATIONS

General Consideration

Constitutionality. — Statutory definition of a nuisance is not vague and indefinite and therefore unconstitutional. *Atlanta Processing Co. v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971).

Section defines an indictable nuisance, and was evidently intended not to authorize the abatement of an act which was not indictable, but to authorize the abatement of indictable nuisances of peculiar virulence, without waiting for an

indictment. *Vason v. South Carolina R.R.*, 42 Ga. 631 (1871).

Section applicable to public and private nuisance. — While this section, in terms, provides only for the abatement of a public nuisance, in the manner therein specified, it has been several times held that a private nuisance may be abated under its operation provided the application is made by the party injured. *Ruff v. Phillips*, 50 Ga. 130 (1873); *Salter v. Taylor*, 55 Ga. 310 (1875); *Hart v. Taylor*, 61 Ga. 156 (1878); *Holmes v. Jones*, 80 Ga.

General Consideration (Cont'd)

659, 7 S.E. 168 (1888); Savannah, F. & W. Ry. v. Gill, 118 Ga. 737, 45 S.E. 623 (1903).

Equitable relief. — If the nuisance is continuing in character, the remedy is inadequate, and equity will take jurisdiction and grant relief. *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

Nuisance may be abated in equity if the hurt or damage is irreparable or continuing. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963).

Operation of lawful business as a nuisance. — While mere apprehension of injury and damage is insufficient, if it is made to appear with reasonable certainty that irreparable harm and damage will occur from the operation of an otherwise lawful business amounting to a continuing nuisance, equity will restrain the construction, maintenance, or operation of such lawful business. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963).

Cited in *South Carolina R.R. v. Ells*, 40 Ga. 87 (1869); *Wetter v. Campbell*, 60 Ga. 266 (1878); *Roberts v. Harrison*, 101 Ga. 773, 28 S.E. 995, 65 Am. St. R. 342 (1897); *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Cole v. Jones*, 8 Ga. App. 737, 70 S.E. 96 (1911); *Adair v. Spellman Sem.*, 13 Ga. App. 600, 79 S.E. 589 (1913); *Giles v. Rawlings*, 148 Ga. 575, 97 S.E. 521 (1918); *Jones v. City of Atlanta*, 40 Ga. App. 300, 149 S.E. 305 (1929); *De Long v. Kent*, 85 Ga. App. 360, 69 S.E.2d 649 (1952); *Hagins v. Howell*, 219 Ga. 276, 133 S.E.2d 8 (1963); *Sizemore v. Coker*, 220 Ga. 773, 141 S.E.2d 891 (1965).

Sufficiency of Allegations

No presumption of damages. — While petitioners were not entitled to all the relief prayed for, or to an injunction against the operation of the defendant's

service station business when conducted in a normal manner accompanied by no more noises than were reasonably necessary, yet the petitioners would be entitled to injunctive relief against unusual and unnecessary noises, provided the proof showed that the operation of the business was attended with such unusual and unnecessary noises, as distinguished from those disturbances and noises which were normal and of the character usually attendant upon the operation of the business of operating a filling station and garage for repairs. *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 4 S.E.2d 155 (1939).

Nuisance being an indirect tort, there is no presumption of damages from its maintenance; and the plaintiff, in order to recover must show the fact of the nuisance and consequent damages. *Crane v. Mays*, 70 Ga. App. 66, 27 S.E.2d 347 (1943).

Petition alleging that the plaintiff purchased a described tract of land, and at the same time acquired an easement adjacent thereto over a lane as a means of ingress and egress from the public road to the plaintiff's farm, that the plaintiff had used this land without interruption since the date the land was acquired until the defendant obstructed the land by placing a "cattle gap" across the land, that such obstruction had interfered with the plaintiff's movement of cattle along that lane to a pasture, thereby causing the plaintiff much inconvenience, trouble, and injury to the plaintiff's cattle, and thereby depriving the plaintiff's family of necessary milk and food, stated a cause of action for injunctive relief. *Ozbolt v. Miller*, 206 Ga. 558, 57 S.E.2d 601 (1950).

Character of proceeding under this chapter was established by the plaintiff's petition and the petition's contents, and this could not be changed into an action to try title to land by the defense sought to be interposed by the defendant. *Barnes v. Cheek*, 84 Ga. App. 653, 67 S.E.2d 145 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, § 50 et seq.

C.J.S. — 66 C.J.S., Nuisances, §§ 107-115, 182-187.

ALR. — Proximate cause as determining landlord's liability, where injury results to a third person from a nuisance that becomes such only upon tenant's using the premises, 4 ALR 740.

Fire escape as an attractive nuisance, 9 ALR 271.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing pecuniary penalty therefor, 12 ALR 431; 121 ALR 642.

Liability of purchaser of premises for nuisance thereon created by predecessor, 14 ALR 1094.

Tannery or curing of hides as a nuisance, or subject of municipal regulation, 32 ALR 1358.

Injunction against games on neighboring property, 62 ALR 782; 32 ALR3d 1127.

Decree abating nuisance as affecting owner not served with process, 63 ALR 698.

Dogs as nuisance, 79 ALR 1060.

Aeroplanes and aeronautics, 99 ALR 173.

Use of property for production of war goods as affecting question of nuisance, and injunction to abate same, 145 ALR 611.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 ALR2d 302.

Stockyard as a nuisance, 18 ALR2d 1033.

Practice of exacting usury as a nuisance or ground for injunction, 83 ALR2d 848.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Saloons or taverns as nuisance, 5 ALR3d 989.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later installments, 32 ALR3d 1127.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance, 40 ALR3d 601.

Validity and construction of statute or ordinance providing for repair or destruction of residential building by public authorities at owner's expense, 43 ALR3d 916.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Nuisance: right of one compelled to discontinue business or activity constituting nuisance to indemnity from successful plaintiff, 53 ALR3d 873.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Bells, carillons, and the like, as nuisance, 95 ALR3d 1268.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 25 ALR5th 568.

41-2-2. Filing of complaint to abate public nuisance.

Private citizens may not generally interfere to have a public nuisance abated. A complaint must be filed by the district attorney, solicitor-general, city attorney, or county attorney on behalf of the public. However, a public nuisance may be abated upon filing of a complaint by any private citizen specially injured. (Orig. Code 1863, § 3999; Code 1868, § 4027; Code 1873, § 4098; Code 1882, § 4098; Civil Code 1895, §§ 4761, 4766; Civil Code 1910, §§ 5330, 5338; Code 1933, § 72-202; Ga. L. 1980, p. 620, § 2; Ga. L. 1999, p. 467, § 1.)

Law reviews. — For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Pub-

lic Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973). For note on 1999 amendment of this Code section, see 16 Ga. St. U.L. Rev. 211 (1999).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
AUTHORITY OF DISTRICT ATTORNEY
JURISDICTION

General Consideration

Actions by private citizens require special injury. — Private citizen specially damaged by a public nuisance may proceed in the citizen's own name and behalf to have the nuisance abated under former Civil Code 1895, §§ 4761 and 4766 (see now O.C.G.A. §§ 41-2-2 and 41-2-3). *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903); *Trust Co. v. Ray*, 125 Ga. 485, 54 S.E. 145 (1906).

Private citizens cannot generally interfere to have a public nuisance enjoined. *Sammons v. Sturgis*, 145 Ga. 663, 89 S.E. 774 (1916).

Generally, a public nuisance gives to any individual no right of action for injunction, but the nuisance must be abated by a process instituted in the name of the state. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

If operation of a picture show on the Sabbath amounts to a public nuisance, such nuisance may be abated in the manner provided by law, or the nuisance may be enjoined upon an information filed by the solicitor general (now district attorney), but an injunction will not be granted at the instance of a private citizen unless one has sustained special injury. *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937); *Crane v. Mays*, 70 Ga. App. 66, 27 S.E.2d 347 (1943).

All injury to health is special, and necessarily limited in its effect to the individual affected, and is, in its nature, irreparable. It matters not that others within the sphere of the operation of the nuisance, whether public or private, may be

affected likewise. *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

While generally a private citizen may not have a public nuisance enjoined, such nuisance may be abated on the application of a citizen specially injured. *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948).

Allegations of petition in which petitioners sought equitable relief "as individuals, citizens, and taxpayers" from the closing of a railroad crossing were insufficient to show special damage to petitioners, or any damage not shared equally by all other "individuals, citizens, and taxpayers," and the petition was therefore insufficient for the grant of any relief to the petitioners as individuals, citizens, and taxpayers. *State Hwy. Dep't v. Reed*, 211 Ga. 197, 84 S.E.2d 561 (1954).

Cited in *Coast Line R.R. v. Cohen*, 50 Ga. 451 (1873); *Ison v. Manley*, 76 Ga. 804 (1886); *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909); *Aiken v. Armistead*, 186 Ga. 368, 198 S.E. 237 (1938); *Poole v. Arnold*, 187 Ga. 734, 2 S.E.2d 83 (1939); *Nichols v. Pirkle*, 202 Ga. 372, 43 S.E.2d 306 (1947); *Kilgore v. Paschall*, 202 Ga. 416, 43 S.E.2d 520 (1947); *De Long v. Kent*, 85 Ga. App. 360, 69 S.E.2d 649 (1952); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *City of Dublin v. Hobbs*, 218 Ga. 108, 126 S.E.2d 655 (1962); *Burgess v. Johnson*, 223 Ga. 427, 156 S.E.2d 78 (1967); *Ungar v. Mayor of Savannah*, 224 Ga. 613, 163 S.E.2d 814 (1968); *J.D. Jewell, Inc. v. State ex rel. Hancock*, 227 Ga. 336, 180

S.E.2d 704 (1971); *Sanders v. McAuliffe*, 364 F. Supp. 654 (N.D. Ga. 1973); *Brock v. Hall County*, 239 Ga. 160, 236 S.E.2d 90 (1977); *Stephens v. Tate*, 147 Ga. App. 366, 249 S.E.2d 92 (1978); *Brand v. Wilson*, 252 Ga. 416, 314 S.E.2d 192 (1984); *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 986 F. Supp. 1406 (N.D. Ga. 1997).

Authority of District Attorney

Acting on information of citizens. —

Lewd house being per se a public nuisance, a court of equity has jurisdiction to abate the nuisance on a suit brought by the district attorney on the information of a citizen as a relator, without alleging or proving special injury to property. *Edison v. Ramsey*, 146 Ga. 767, 92 S.E. 513 (1917).

District attorney is not authorized to act on the information of citizens, except in case of a public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

In order for a solicitor general (now district attorney) to proceed for the public, on information filed with the solicitor by citizens, to enjoin a nuisance, the object which it is sought to enjoin must be a public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

Complaint must name citizen furnishing information. — Court of equity will not entertain a bill in the name of one or more private citizens to restrain a public nuisance, no private injury or threatened injury being alleged to such citizens or to their property. In such a case, the nuisance being a purely public one, can only be restrained by the public, on information filed by a public officer, to wit: by the solicitor general (now district attorney) for the Circuit. This holding is declar-

atory of the common-law rule which is universally adopted and quite uniform. *Mayor of Columbus v. Jaques*, 30 Ga. 506 (1860).

Complaint in equity filed by the district attorney to abate a public nuisance must name the citizen or citizens upon whose information the complaint is based. *Chancey v. Hancock*, 233 Ga. 734, 213 S.E.2d 633 (1975).

Authority not repealed by Air Quality Control Act. — Authority granted to district attorneys to abate public nuisances relating to air pollution was not repealed to any extent by the former Georgia Air Quality Control Act. *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 175 S.E.2d 847 (1970).

Jurisdiction

Jurisdiction by court of equity to grant injunction. — Court of equity has jurisdiction, and in a proper case may by injunction restrain a public nuisance upon information filed by the solicitor general (now district attorney). *Gullatt v. State ex rel. Collins*, 169 Ga. 538, 150 S.E. 825 (1929).

Court of equity has jurisdiction and in a proper case will, by injunction, restrain a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Equity, generally, will not interfere with the administration of the criminal law. The state, however, has an interest in the welfare, peace, and good order of the state's citizens and communities and has provided in the state's laws for the abatement of nuisances when the public generally is injured. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

By clear and necessary implication, an injunction will lie in the name of the state to enjoin a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 212, 217, 218, 225, 226, 377, 379, 381.

C.J.S. — 43 C.J.S., Injunctions, § 26.

66 C.J.S., Nuisances, §§ 109 et seq., 118-120, 192 et seq.

ALR. — Injunction to prevent establishment or maintenance of garbage or

sewage disposal plant, 5 ALR 920; 47 ALR 1154.

Special injury to property interest as condition of right to enjoin diversion of dedicated property, 41 ALR 1410.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Public dances or dance halls as nuisances, 44 ALR2d 1381.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Saloons or taverns as nuisance, 5 ALR3d 989.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Liability in connection with fire or ex-

plosion of explosives while being stored or transported, 35 ALR3d 1177.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 ALR3d 426.

Public swimming pool as nuisance, 49 ALR3d 652.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 ALR3d 665.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Carwash as nuisance, 4 ALR4th 1308.

41-2-3. Filing of petition to abate private nuisance.

A private nuisance may be abated upon filing of a petition by the person injured. (Orig. Code 1863, § 3999; Code 1868, § 4027; Code 1873, § 4098; Code 1882, § 4098; Civil Code 1895, § 4766; Civil Code 1910, § 5338; Code 1933, § 72-203; Ga. L. 1980, p. 620, § 3.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

STATUTE OF LIMITATIONS

General Consideration

Cited in Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941); De Long v. Kent, 85 Ga. App. 360, 69 S.E.2d 649 (1952); Clark v. Baety, 216 Ga. 42, 114 S.E.2d 527 (1960).

Statute of Limitations

Statute of limitations not a bar to equitable relief. — Plaintiff's right to

equitable relief was not barred by the statute of limitations on grounds that the nuisance complained of had existed for a period of more than four years prior to the institution of litigation, since when there is a continuing nuisance, a new cause of action arises daily and a court of equity takes jurisdiction in such a case to avoid a multiplicity of suits. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 212, 213, 217, 226, 377-381.

C.J.S. — 66 C.J.S., Nuisances, §§ 107-115, 184 et seq., 192 et seq.

ALR. — Ice manufacturing or distributing plant as nuisance, 41 ALR 626.

Injunction against games on neighboring property, 62 ALR 782; 32 ALR3d 1127.

Casting of light on another's premises as constituting actionable wrong, 5 ALR2d 705; 79 ALR3d 253.

Public dances or dance halls as nui-

sances, 44 ALR2d 1381.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments, 32 ALR3d 1127.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 ALR3d 426.

Residential swimming pool as nuisance, 49 ALR3d 545.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Operation of cement plant as nuisance, 82 ALR3d 1004.

Funeral home as private nuisance, 8 ALR4th 324.

41-2-4. Issuance of injunction where nuisance about to be erected or commenced likely to result in irreparable damage.

Where the consequence of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed. (Orig. Code 1863, § 2944; Code 1868, § 2951; Code 1873, § 3002; Code 1882, § 3002; Civil Code 1895, § 3863; Civil Code 1910, § 4459; Code 1933, § 72-204; Ga. L. 1980, p. 620, § 4.)

Law reviews. — For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

BASIS OF INJUNCTION

JURISDICTION

ORDER OF ABATEMENT

General Consideration

Injunction will lie in name of state.

— By clear and necessary implication, an injunction will lie in the name of the state to enjoin a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Generally, a public nuisance gives to any individual no right of action for injunction, but the nuisance must be abated by a process instituted in the name of the state. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Cited in *Mygatt v. Goetchins*, 20 Ga. 350 (1856); *Sullivan, Cabot & Co. v. Rome R.R.*, 28 Ga. 29 (1859); *Kirtland v. Mayor*

of Macon, 66 Ga. 385 (1881); *Wingate v. City of Doerun*, 177 Ga. 373, 170 S.E. 226 (1933); *Vaughn v. Burnette*, 211 Ga. 206, 84 S.E.2d 568 (1954); *Payne v. Terrell*, 269 Ga. App. 540, 604 S.E.2d 551 (2004); *Hitch v. Vasarhelyi*, 285 Ga. 627, 680 S.E.2d 411 (2009).

Basis of Injunction

Nuisance must be certain. — It is only when it is made to appear with reasonable certainty that an instrumentality in the course of construction will necessarily constitute a nuisance that a court of equity will exercise the power to restrain. *Elder v. City of Winder*, 201 Ga. 511, 40 S.E.2d 659 (1946).

Basis of Injunction (Cont'd)

Court of equity will only exercise the power to restrain the erection of a building, and the maintenance therein, after construction, of a lawful business, on the ground that the operation of such business will constitute a nuisance, when it is made to appear with reasonable certainty that such operation necessarily constitutes a nuisance, the consequences of which will be irreparable in damages. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

If the injury is either irreparable or continuing, an injunction will be granted. *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S.E. 193 (1898).

Nuisance may be abated in equity if the hurt or damage is irreparable or continuing. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963).

Nuisance per accidens by reason of circumstances and surroundings may be abated in equity if the hurt or damage is irreparable or continuing. *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

Injunction will be granted when the damages can be ascertained, and all rights finally adjudicated in one action. *Wheeler v. Steele*, 50 Ga. 24 (1873); *Powell v. Foster*, 59 Ga. 790 (1877).

Continuing nuisance gives a new cause of action for each day of its continued maintenance, and in such a case, in order to avoid a multiplicity of suits, a court of equity will entertain jurisdiction to enjoin the nuisance and also have the nuisance abated. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Evidence obtained by illegal search or seizure. — When the evidence in support of injunctions to abate a public nuisance is obtained by illegal searches and seizures, the portions of the judgments granting such injunctions are void. *Carson v. State ex rel. Price*, 221 Ga. 299, 144 S.E.2d 384 (1965).

Exclusion of opinion evidence of nonexperts. — Method of taking testimony, when an injunction had been applied for, was found in former Part 2, Art.

2, Ch. 10, T. 24; however, opinion evidence of nonexperts would be excluded. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S.E. 1126 (1910).

Mere apprehension of injury and damage. — Allegation of "mere speculative or contingent injuries, with nothing to show that they will in fact happen," will not support a prayer to enjoin a nuisance. *Harrison v. Brooks*, 20 Ga. 537 (1856); *Bailey v. Ross*, 68 Ga. 735 (1882); *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S.E. 1126 (1910); *Elder v. City of Winder*, 201 Ga. 511, 40 S.E.2d 659 (1946).

Mere apprehension of irreparable injury from an alleged nuisance, consisting of a house in course of construction for a lawful business use, is not sufficient to authorize an injunction. If it be a nuisance, the consequences must be to a reasonable degree certain. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Mere apprehension of irreparable injury from an alleged nuisance consisting of a house in the course of construction or alteration for a lawful business is not sufficient to authorize an injunction. *Roberts v. Rich*, 200 Ga. 497, 37 S.E.2d 401 (1946).

Allegations of mere speculative or contingent injuries, with nothing to show that in fact the injuries will happen, are insufficient to support a prayer for injunctive relief. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

Mere apprehension of injury, based on the assumption that a lawful business not then in operation will be operated in the future in an improper manner, so as to become a nuisance, is not sufficient to authorize equity to enjoin the erection of a building wherein such business is to be carried on. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

Mere anticipation of injury from the operation of a lawful business will not authorize the grant of an injunction. *Davis v. Miller*, 212 Ga. 836, 96 S.E.2d 498 (1957).

When a petition fails to show the facts from which it appears with reasonable certainty that the operation of the business will work hurt, inconvenience, and damage, it falls just short of alleging a

nuisance per accidens against which an injunction should be granted. *Griffith v. Newman*, 217 Ga. 533, 123 S.E.2d 723 (1962).

While mere apprehension of injury and damage is insufficient, if it is made to appear with reasonable certainty that irreparable harm and damage will occur from the operation of an otherwise lawful business amounting to a continuing nuisance, equity will restrain the construction, maintenance, or operation of such lawful business. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963); *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

Fears of abutting landowners that land condemned for use as a football stadium would become a nuisance were too speculative to permit the enjoining of the condemnation. *Herren v. Board of Educ.*, 219 Ga. 431, 134 S.E.2d 6 (1963).

Trial court properly declined to permanently enjoin the defendants from using their property as a public motocross track. The defendants closed the track to the public before the plaintiffs filed suit, and the plaintiffs did not establish to a reasonably certain degree under O.C.G.A. § 41-2-4 that the defendants would reopen it to the public; thus, the trial court was not required to issue an injunction merely because the plaintiffs apprehended a public use at some future time. *Evans v. Knott*, 282 Ga. 584, 652 S.E.2d 535 (2007).

Granting and dissolution of injunctions. — Interlocutory injunction may be granted against the establishment of business until the final trial of the case before the jury. *Morrison v. Slappey*, 153 Ga. 724, 113 S.E. 82 (1922).

Use of restraining order. — While an injunction which is purely mandatory in the injunction's nature cannot be granted, the court may grant an order the essential nature of which is to restrain, although in yielding obedience to the restrain the defendant may incidentally be compelled to perform some act. *Central of Ga. Ry. v. Americus Constr. Co.*, 133 Ga. 392, 65 S.E. 855 (1909).

Injunction granted enjoining escape of gases from a city sewer. — See

Central of Ga. Ry. v. Americus Constr. Co., 133 Ga. 392, 65 S.E. 855 (1909).

Unlicensed obstruction of public street. — See *Savannah, A. & G.R.R. v. Shields*, 33 Ga. 601 (1863).

Dumping trash on another's land. — See *Lowe v. Holbrook*, 71 Ga. 563 (1883); *Butler v. Mayor of Thomasville*, 74 Ga. 570 (1885).

Obstruction of an alley. — See *Murphy v. Harker*, 115 Ga. 77, 41 S.E. 585 (1902).

Diversion of a watercourse. — See *Persons v. Hill*, 33 Ga. 141 (1864).

Municipal license of cars in its street for private use. — See *Mayor of Macon v. Harris*, 73 Ga. 428 (1884).

Construction of a pond. — See *De Vaughn v. Minor*, 77 Ga. 809, 1 S.E. 433 (1887).

Maintaining livery stable. — See *Coker v. Birge*, 10 Ga. 336 (1851). But see *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. R. 505 (1882).

Operation of poultry houses. — See *May v. Brueshaber*, 265 Ga. 889, 466 S.E.2d 196 (1995).

Grocery business in residential area. — It was not error for a trial court to dismiss a petition complaining that a proposed warehouse and wholesale grocery business in a residential section would constitute a nuisance, causing irreparable damage to the plaintiffs, and seeking an injunction to restrain the construction of the proposed building, because such a business is not necessarily a nuisance per se, even in a residential neighborhood, and mere apprehension of irreparable injury is insufficient. *Roberts v. Rich*, 200 Ga. 497, 37 S.E.2d 401 (1946).

Effect of abatement of nuisance before trial. — If subsequently to the institution of the action, but prior to the trial, the defendant has practically abated the nuisance, a refusal to grant an injunction is proper. *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S.E. 193 (1898).

Jurisdiction

Court of equity has jurisdiction and in a proper case will, by injunction, restrain a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Jurisdiction (Cont'd)

Prospective or future damages not recoverable. — Equity courts have the power to abate nuisances, but, if the nuisance complained of is merely temporary, then prospective or future damages, as damages for permanent injury, are not recoverable. *Ward v. Southern Brighton Mills*, 45 Ga. App. 262, 164 S.E. 214 (1932).

Application of equity to nuisance and not criminal law. — Equity, generally, will not interfere with the administration of the criminal law. The state, however, has an interest in the welfare, peace, and good order of the state's citizens and communities and has provided

in the state's laws for the abatement of nuisances when the public generally is injured. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Order of Abatement

Sufficiency of order. — Order restraining the defendant from permitting any gases or vapors to escape from, or be carried beyond, the ground owned by the defendant company and upon which the company's plant was located, so as to constitute a nuisance, as defined in former Civil Code 1910, §§ 4457 and 4459 (see now O.C.G.A. §§ 41-1-1 and 41-2-4) was sufficiently specific. *Morris Fertilizer Co. v. Boykin*, 149 Ga. 673, 101 S.E. 799 (1920).

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, §§ 51, 53, 248. 58 Am. Jur. 2d, Nuisances, §§ 285-292.

C.J.S. — 43 C.J.S., Injunctions, §§ 16, 17, 20 et seq. 66 C.J.S., Nuisances, §§ 209-219.

ALR. — Injunction to prevent establishment or maintenance of garbage or sewage disposal plant, 5 ALR 920; 47 ALR 1154.

Nuisance resulting from smoke alone as subject for injunctive relief, 6 ALR 1575.

Right to enjoin threatened or anticipated nuisance, 26 ALR 937; 32 ALR 724; 55 ALR 880.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoined nuisance, 21 ALR3d 1058.

Punitive damages in actions based on nuisance, 31 ALR3d 1346.

Operation of cement plant as nuisance, 82 ALR3d 1004.

41-2-5. Authorization and procedure for abatement of nuisances in cities and unincorporated areas of counties.

If the existence of a nuisance is complained of in a county or city of this state, the municipal court of the city, if the nuisance complained of is in the city, shall have jurisdiction to hear and determine the question of the existence of such nuisance and, if found to exist, to order its abatement. If the nuisance complained of is located in the unincorporated area of a county, the magistrate court of the county, unless otherwise provided by local law, shall have such jurisdiction and power to order its abatement. (Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 3996; Code 1868, § 4024; Code 1873, § 4095; Code 1882, § 4095; Ga. L. 1892, p. 64, § 1; Civil Code 1895, § 4762; Civil Code 1910, § 5331; Code 1933, § 72-401; Ga. L. 1981, p. 1739, § 1; Ga. L. 1987, p. 3, § 41; Ga. L. 1988, p. 1419, § 1.)

Cross references. — Content of municipal or county ordinances relating to repair, closing, or demolition of dwellings unfit for human habitation, § 36-61-11.

Law reviews. — For article, "Delegation in Georgia Local Government Law,"

see 7 Ga. St. B.J. 9 (1970). For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NOTICE

DELEGATION OF POWER TO ABATE NUISANCES

JURISDICTION

PLEADING AND PRACTICE

General Consideration

It is an exercise of judicial power, to determine what is by law a nuisance and only those things which are by the common or statute law declared to be nuisances per se, or which in their very nature are such, may be summarily suppressed. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

Mere apprehension of injury. — Nuisance law does not apply if there is a mere apprehension of an irreparable injury. *Wingate v. City of Doerun*, 177 Ga. 373, 170 S.E. 226 (1933).

Any nuisance injurious to the public health is within the terms of this section. *Strong v. LaGrange Mills*, 112 Ga. 117, 37 S.E. 117 (1900); *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909); *Griggs v. City of Macon*, 154 Ga. 519, 114 S.E. 899 (1922).

Proceedings in name of city upon application of citizen. — If the nuisance is a public one merely, and no private individual suffered special damages therefrom, then the proceedings to abate the nuisance should be in the name of the city upon the application of some citizen. *Calhoun ex rel. Chapman v. Gulf Oil Corp.*, 189 Ga. 414, 5 S.E.2d 902 (1939).

Cited in *Spencer v. Tumlin*, 155 Ga. 341, 116 S.E. 600 (1923); *City Council v. Sanders*, 164 Ga. 235, 138 S.E. 234 (1927); *Jones v. City of Atlanta*, 40 Ga. App. 300, 149 S.E. 305 (1929); *Albany Theater, Inc.*

v. Short, 171 Ga. 57, 154 S.E. 895 (1930); *O'Quinn v. Mayor of Homerville*, 42 Ga. App. 628, 157 S.E. 109 (1931); *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937); *Lockwood v. Daniel*, 193 Ga. 122, 17 S.E.2d 542 (1941); *Foster v. Mayor of Carrollton*, 68 Ga. App. 796, 24 S.E.2d 143 (1943); *De Long v. Kent*, 85 Ga. App. 360, 69 S.E.2d 649 (1952); *Johnson v. Willingham*, 212 Ga. 310, 92 S.E.2d 1 (1956); *Neel v. Clark*, 221 Ga. 439, 145 S.E.2d 235 (1965); *Cronic v. State*, 222 Ga. 623, 151 S.E.2d 448 (1966); *Shaffer v. City of Atlanta*, 223 Ga. 249, 154 S.E.2d 241 (1967); *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967); *Ford v. Crawford*, 240 Ga. 612, 241 S.E.2d 829 (1978); *Yield, Inc. v. City of Atlanta*, 152 Ga. App. 171, 262 S.E.2d 481 (1979); 660 *Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980).

Notice

Building inspector not authorized to substitute the inspector's judgment. — Under the general law of this state and this section, the building inspector of the City of Atlanta was not authorized to substitute the inspector's judgment for that of the tribunal fixed by law, and serve notices on the property owners that the owners' property "constitutes a nuisance," or that the property had been "condemned." *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

Reasonable notice of hearing on abatement. — Reasonable notice to the property owner of the time and place of

Notice (Cont'd)

hearing must precede any judgment ordering the abatement (destruction) of private property as a nuisance. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

Delegation of Power to Abate Nuisances

Lawful delegation of police power to abate nuisances. — City's agreement to cooperate with the city's local housing authority in effecting elimination of unsafe or insanitary dwellings with the approval of the United States Public Housing Administration does not contemplate or provide for an unlawful delegation of the city's police power to abate nuisances to the public housing administration but amounts only to an assurance of a proper exercise of the power by the city to the end that it will do what it ought in any event to do, namely, eliminate unsafe or insanitary dwellings in the interest of general welfare, as it alone can lawfully do. *Telford v. City of Gainesville*, 208 Ga. 56, 65 S.E.2d 246 (1951).

Jurisdiction

Jurisdiction generally. — This section gives no power to justices of the peace (now magistrates); power is vested in the city government alone. *South Carolina R.R. v. Ells*, 40 Ga. 87 (1869).

Part of the section (formerly) relating to jurisdiction in cities of twenty thousand inhabitants confers such jurisdiction in the police court alone of the city where the nuisance exists, except in cases of nuisance per se. *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909).

Filing abatement proceedings with municipal authorities. — Proceedings to abate a nuisance, public or private, alleged to exist within an incorporated municipality, must be filed with and determined by the municipal authorities, unless there are special circumstances, requiring the intervention of equity. *Waller v. Lanier*, 198 Ga. 64, 30 S.E.2d 925

(1944); *Mitchell v. Green*, 201 Ga. 256, 39 S.E.2d 696 (1946).

Section provides adequate remedy.

— To abate a nuisance, public or private, the remedy provided in this section should be resorted to, unless the special facts make the remedy inadequate. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

This section provides an adequate remedy for the abatement of a nuisance, public or private, which has been created and which exists within the limits of a town or city, and that remedy must be resorted to for its abatement, unless there are special facts which make the remedy inadequate. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

Plaintiff must apply to city recorder for order abating nuisance. — When the city responsible for an alleged nuisance (formerly) had a population of more than 20,000, the plaintiff was required to apply to the city's recorder for an order abating the nuisance complained of. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

Review of recorder's decision by certiorari in superior court. — Any decision rendered by city's recorder had to be reviewed by certiorari in the superior court. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

Writ of prohibition properly denied. — When the City of Atlanta brought a proceeding in the recorder's court to abate a nuisance, the penal features of the proceeding being abandoned, and the defendant sued out in the superior court a petition for the writ of prohibition to prevent the recorder from proceeding with the case, the writ was properly denied, the writ of prohibition is never granted when there is any other legal remedy, and this section provided an adequate and complete remedy in the case. *Magbee v. City of Atlanta*, 180 Ga. 733, 180 S.E. 485 (1935).

Availability of certiorari. — Decision by the governing body of a municipality as to whether alleged acts constitute a nuisance, made after trial in which the parties at interest have participated, is a judicial determination from which certiorari will lie. *Attaway v. Coleman*, 213 Ga. 329, 99 S.E.2d 154 (1957).

City criminal court empowered to abate continuing nuisance. — Fact that the General Assembly made the continuation of a nuisance after notice to abate a misdemeanor (O.C.G.A. § 41-1-6), does not preclude the criminal court of Cordele's power to abate nuisances pursuant to the legislative authorization in O.C.G.A. § 41-2-5, and the court's power to enforce the court's judgments by contempt pursuant to the legislative authorization in the city charter. *Horne v. City of Cordele*, 254 Ga. 346, 329 S.E.2d 134 (1985).

Proceedings not criminal in nature. — Proceeding in municipal court to determine the question of whether a nuisance existed was not criminal or quasi criminal in nature since the court cannot fine or imprison the defendant in error, and the bond required for certiorari is that provided for in former Code 1933, §§ 19-206, 19-207, and 19-208 (see now O.C.G.A. § 5-4-5) for civil proceedings, and a bond under former Code 1933, §§ 19-214 and 19-215 (see now O.C.G.A. § 5-4-20) would not suffice. *City of Atlanta v. Pazol*, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

Equitable jurisdiction. — Equity will take jurisdiction when the majority of council are disqualified. *Hill v. McBurney Oil & Fertilizer Co.*, 112 Ga. 788, 38 S.E. 42, 52 L.R.A. 398 (1901).

When a municipal corporation itself is maintaining a nuisance, and a proper case exists for the nuisance's abatement, equity will take jurisdiction, notwithstanding the provisions of this section, which prescribe the manner of abatement when the nuisance complained of shall exist in an incorporated town or city. *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940).

Although a nuisance exists in a city under the government of a mayor or common council, a court of equity will in a proper case take jurisdiction of a suit to enjoin continuance of the nuisance, notwithstanding the provisions of this section, when the nuisance is a continuing one. *State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

When there is a continuing nuisance,

which plaintiffs allege will cause sickness, the remedy provided under this section does not furnish an ample and complete remedy for the plaintiffs. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

If alleged conduct constituted a continuing nuisance under former Code 1933, § 72-101 (see now O.C.G.A. § 41-1-1), the plaintiff was entitled to equitable relief. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Petition alleging that a nuisance was a continuing one and injuriously affected the comfort and health of the petitioners in described particulars, and alleging that unless enjoined would cause irreparable damage to petitioners and result in a multiplicity of suits, was not subject to the ground of demurrer that it showed on its face that the petitioners had an adequate remedy at law. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Since a continuing nuisance was alleged, and since a continuing nuisance may be enjoined by a court of equity it was not error for the trial court to overrule the plea to the jurisdiction, wherein it was asserted that, by virtue of this section the mayor and city council of Springfield had jurisdiction to abate a nuisance in the form of a previously erected obstruction to a private way within the corporate limits of a city of less than 20,000 population. *Rahn v. Pittman*, 216 Ga. 523, 118 S.E.2d 85 (1961).

In situations where there is a continuing nuisance, this section does not afford an adequate remedy at law and a court of equity will entertain jurisdiction to enjoin the nuisance and have the nuisance abated. *City of Atlanta v. Wolcott*, 240 Ga. 244, 240 S.E.2d 83 (1977).

No conversion to equitable proceeding by use of evidentiary standard. — When a party elected to proceed under former Code 1933, 72-401 (see now O.C.G.A. § 41-2-5), it was an action at law and using the evidentiary standard contained in former Code 1933, 72-301 (see now O.C.G.A. § 41-3-1) did not convert the proceeding into an equitable one. *Yield, Inc. v. City of Atlanta*, 145 Ga. App. 172, 244 S.E.2d 32, cert. dismissed, 241 Ga. 593, 247 S.E.2d 764 (1978).

Pleading and Practice

It is an action at law where a party elects to proceed under this section. *Yield, Inc. v. City of Atlanta*, 239 Ga. 578, 238 S.E.2d 351 (1977).

Certiorari and not prohibition is the remedy by which officers should be forced to follow this section. *Mayor of*

Montezuma v. Minor, 70 Ga. 191 (1883).

Failure to include the municipality as a party is not ground for dismissal. See *Trust Co. v. Ray*, 125 Ga. 485, 54 S.E. 145 (1906).

This section does not confer authority to impose a fine. *Healey v. City of Atlanta*, 125 Ga. 736, 54 S.E. 749 (1906).

OPINIONS OF THE ATTORNEY GENERAL

Determination of substandard buildings as nuisance. — If substandard buildings in a town or city are alleged to be a nuisance, this may be determined in accordance with this section; this determination must be made subject to the due process provisions of state and federal Constitutions; if a nuisance is found to exist, the court can order its

abatement; if the property owner fails to abate the nuisance, he may be bound over to a court having jurisdiction of misdemeanors; the municipality cannot itself demolish the offending buildings unless it condemns the property and compensates the owner. 1970 Op. Att'y Gen. No. U70-229.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Political Subdivisions, §§ 443-446. 58 Am. Jur. 2d, Nuisances, §§ 28, 50, 351, 352, 371, 372.

C.J.S. — 62 C.J.S., Municipal Corporations, § 281.

ALR. — Tannery or curing of hides as a nuisance, or subject of municipal regulation, 32 ALR 1358.

Validity of municipal ordinance prohibiting or regulating keeping of livestock, 32 ALR 1372; 40 ALR 566.

Right of abutting owner to complain of misuse of public park or violation of rights or easements appurtenant thereto, 60 ALR 770.

Right, as between state and county or municipality, to maintain action to abate a public nuisance in a street or highway, 65 ALR 699.

Validity, construction, and application of statute or ordinance declaring plant or

establishment which emits offensive odors to be a public nuisance, 141 ALR 285.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Dairy, creamery, or milk distributing plant, as nuisance, 92 ALR2d 974.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

41-2-6. Notice of meeting to determine question of abatement.

Repealed by Ga. L. 1981, p. 1739, § 1, effective April 17, 1981.

Editor's notes. — This Code section was based on Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 3997; Code 1868, § 4025; Code 1873, § 4096; Code

1882, § 4096; Civil Code 1895, § 4763;
Civil Code 1910, § 5332; Code 1933,
§ 72-402.

41-2-7. Power of counties and municipalities to repair, close, or demolish unfit buildings or structures; health hazards on private property; properties affected.

(a) It is found and declared that in the counties and municipalities of this state there is the existence or occupancy of dwellings or other buildings or structures which are unfit for human habitation or for commercial, industrial, or business occupancy or use and not in compliance with the applicable state minimum standard codes as adopted by ordinance or operation of law or any optional building, fire, life safety, or other codes relative to the safe use of real property and real property improvements adopted by ordinance in the jurisdiction where the property is located; or general nuisance law and which constitute a hazard to the health, safety, and welfare of the people of this state; and that a public necessity exists for the repair, closing, or demolition of such dwellings, buildings, or structures. It is found and declared that in the counties and municipalities of this state where there is in existence a condition or use of real estate which renders adjacent real estate unsafe or inimical to safe human habitation, such use is dangerous and injurious to the health, safety, and welfare of the people of this state and a public necessity exists for the repair of such condition or the cessation of such use which renders the adjacent real estate unsafe or inimical to safe human habitation. Whenever the governing authority of any county or municipality of this state finds that there exist in such county or municipality dwellings, buildings, or structures which are unfit for human habitation or for commercial, industrial, or business uses due to dilapidation and not in compliance with applicable codes; which have defects increasing the hazards of fire, accidents, or other calamities; which lack adequate ventilation, light, or sanitary facilities; or where other conditions exist rendering such dwellings, buildings, or structures unsafe or unsanitary, or dangerous or detrimental to the health, safety, or welfare, or otherwise inimical to the welfare of the residents of such county or municipality, or vacant, dilapidated dwellings, buildings, or structures in which drug crimes are being committed, power is conferred upon such county or municipality to exercise its police power to repair, close, or demolish the aforesaid dwellings, buildings, or structures in the manner provided in this Code section and Code Sections 41-2-8 through 41-2-17.

(b) All the provisions of this Code section and Code Sections 41-2-8 through 41-2-17 including method and procedure may also be applied to private property where there exists an endangerment to the public health or safety as a result of unsanitary or unsafe conditions to those

persons residing or working in the vicinity. A finding by any governmental health department, health officer, or building inspector that such property is a health or safety hazard shall constitute prima-facie evidence that said property is in violation of this Code section and Code Sections 41-2-8 through 41-2-17.

(c) The exercise of the powers conferred upon counties in this Code section and in Code Sections 41-2-8 through 41-2-17 shall be limited to properties located in the unincorporated areas of such counties. (Ga. L. 1966, p. 3089, § 2; Ga. L. 1977, p. 4445, § 2; Code 1981, § 41-2-7, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1986, p. 10, § 41; Ga. L. 1986, p. 1508, § 1; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 1; Ga. L. 2001, p. 1196, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, in the first sentence of subsection (b), “property” was substituted for “proeprty” and a comma was deleted following “conditions.”

Law reviews. — For annual survey of local government law, see 38 Mercer L.

Rev. 289 (1986). For article, “Local Government Law,” see 53 Mercer L. Rev. 389 (2001).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Health, §§ 25, 34, 42-44. 58 Am. Jur. 2d, Nuisances, §§ 132, 133, 278.

C.J.S. — 39A C.J.S., Health and Environment, §§ 30 et seq., 48, 49. 66 C.J.S., Nuisances, §§ 36, 40, 41, 109 et seq.

JUDICIAL DECISIONS

Cited in Walker County v. Tri-State Crematory, 284 Ga. App. 34, 643 S.E.2d 324 (2007).

41-2-8. Definitions for use in Code Sections 41-2-7 through 41-2-17.

As used in Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17, the term:

(1) “Applicable codes” means (A) any optional housing or abatement standard provided in Chapter 2 of Title 8 as adopted by ordinance or operation of law, or other property maintenance standards as adopted by ordinance or operation of law, or general nuisance law, relative to the safe use of real property; (B) any fire or life safety code as provided for in Chapter 2 of Title 25; and (C) any building codes adopted by local ordinance prior to October 1, 1991, or the minimum standard codes provided in Chapter 2 of Title 8 after October 1, provided that such building or minimum standard codes for real property improvements shall be deemed to mean those

building or minimum standard codes in existence at the time such real property improvements were constructed unless otherwise provided by law.

(2) “Closing” means causing a dwelling, building, or structure to be vacated and secured against unauthorized entry.

(3) “Drug crime” means an act which is a violation of Article 2 of Chapter 13 of Title 16, known as the “Georgia Controlled Substances Act.”

(4) “Dwellings, buildings, or structures” means any building or structure or part thereof used and occupied for human habitation or commercial, industrial, or business uses, or intended to be so used, and includes any outhouses, improvements, and appurtenances belonging thereto or usually enjoyed therewith and also includes any building or structure of any design. As used in Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17, the term “dwellings, buildings, or structures” shall not mean or include any farm, any building or structure located on a farm, or any agricultural facility or other building or structure used for the production, growing, raising, harvesting, storage, or processing of crops, livestock, poultry, or other farm products.

(5) “Governing authority” means the board of commissioners or sole commissioner of a county or the council, board of commissioners, board of aldermen, or other legislative body charged with governing a municipality.

(6) “Interested parties” means:

(A) Owner;

(B) Those parties having an interest in the property as revealed by a certification of title to the property conducted in accordance with the title standards of the State Bar of Georgia;

(C) Those parties having filed a notice in accordance with Code Section 48-3-9;

(D) Any other party having an interest in the property whose identity and address are reasonably ascertainable from the records of the petitioner or records maintained in the county courthouse or by the clerk of the court. Interested parties shall not include the holder of the benefit or burden of any easement or right of way whose interest is properly recorded which interest shall remain unaffected; and

(E) Persons in possession of said property and premises.

(7) “Municipality” means any incorporated city within this state.

(8) “Owner” means the holder of the title in fee simple and every mortgagee of record.

(9) “Public authority” means any member of a governing authority, any housing authority officer, or any officer who is in charge of any department or branch of the government of the municipality, county, or state relating to health, fire, or building regulations or to other activities concerning dwellings, buildings, or structures in the county or municipality.

(10) “Public officer” means the officer or officers who are authorized by Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17 and by ordinances adopted under Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17 to exercise the powers prescribed by such ordinances or any agent of such officer or officers.

(11) “Repair” means altering or improving a dwelling, building, or structure so as to bring the structure into compliance with the applicable codes in the jurisdiction where the property is located and the cleaning or removal of debris, trash, and other materials present and accumulated which create a health or safety hazard in or about any dwelling, building, or structure.

(12) “Resident” means any person residing in the jurisdiction where the property is located on or after the date on which the alleged nuisance arose. (Code 1981, § 41-2-8, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1986, p. 1508, § 2; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1989, p. 1161, § 2; Ga. L. 1991, p. 94, § 41; Ga. L. 2001, p. 1196, § 2; Ga. L. 2004, p. 907, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, “Interested parties” was substituted for “Interested party” twice in paragraph (6).

Pursuant to Code Section 28-9-5, in 2005, the quotation marks surrounding

“Interested parties” were deleted in the last sentence of subparagraph (6)(D).

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

41-2-9. County or municipal ordinances relating to unfit buildings or structures.

(a) In addition to any other remedies or enforcement mechanisms available, upon the adoption of an ordinance finding that dwelling, building, or structure conditions of the character described in Code Section 41-2-7 exist within a county or municipality, the governing body of such county or municipality is authorized to adopt ordinances relating to the dwellings, buildings, or structures within such county or municipality which are unfit for human habitation or commercial, industrial, or business uses and not in compliance with applicable codes, which are vacant and being used in connection with the commis-

sion of drug crimes, or which constitute an endangerment to the public health or safety as a result of unsanitary or unsafe conditions. Such ordinances shall include at least the following provisions:

(1) That it is the duty of the owner of every dwelling, building, structure, or property within the jurisdiction to construct and maintain such dwelling, building, structure, or property in conformance with applicable codes in force within the jurisdiction, or such ordinances which regulate and prohibit activities on property and which declare it to be a public nuisance to construct or maintain any dwelling, building, structure, or property in violation of such codes or ordinances;

(2) That a public officer be designated or appointed to exercise the powers prescribed by the ordinances;

(3) That whenever a request is filed with the public officer by a public authority or by at least five residents of the municipality or by five residents of the unincorporated area of the county if the property in question is located in the unincorporated area of the county charging that any dwelling, building, structure, or property is unfit for human habitation or for commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the public officer shall make an investigation or inspection of the specific dwelling, building, structure, or property. If the officer's investigation or inspection identifies that any dwelling, building, structure, or property is unfit for human habitation or for commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the public officer may issue a complaint in rem against the lot, tract, or parcel of real property on which such dwelling, building, or structure is situated or where such public health hazard or general nuisance exists and shall cause summons and a copy of the complaint to be served on the interested parties for such dwelling, building, or structure. The complaint shall identify the subject real property by appropriate street address and official tax map reference; identify the interested parties; state with particularity the factual basis for the action; and contain a statement of the action sought by the public officer to abate the alleged nuisance. The summons shall notify the interested parties that a hearing will be held before a court of competent jurisdiction as determined by Code Section 41-2-5, at a date and time certain and at a place within the county or municipality where the property is located. Such hearing shall be held not less

than 15 days nor more than 45 days after the filing of said complaint in the proper court. The interested parties shall have the right to file an answer to the complaint and to appear in person or by attorney and offer testimony at the time and place fixed for hearing;

(4) That if, after such notice and hearing, the court determines that the dwelling, building, or structure in question is unfit for human habitation or is unfit for its current commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the court shall state in writing findings of fact in support of such determination and shall issue and cause to be served upon the interested parties that have answered the complaint or appeared at the hearing an order:

(A) If the repair, alteration, or improvement of the said dwelling, building, or structure can be made at a reasonable cost in relation to the present value of the dwelling, building, or structure, requiring the owner, within the time specified in the order, to repair, alter, or improve such dwelling, building, or structure so as to bring it into full compliance with the applicable codes relevant to the cited violation and, if applicable, to secure the structure so that it cannot be used in connection with the commission of drug crimes; or

(B) If the repair, alteration, or improvement of the said dwelling, building, or structure in order to bring it into full compliance with applicable codes relevant to the cited violations cannot be made at a reasonable cost in relation to the present value of the dwelling, building, or structure, requiring the owner, within the time specified in the order, to demolish and remove such dwelling, building, or structure and all debris from the property.

For purposes of this Code section, the court shall make its determination of “reasonable cost in relation to the present value of the dwelling, building, or structure” without consideration of the value of the land on which the structure is situated; provided, however, that costs of the preparation necessary to repair, alter, or improve a structure may be considered. Income and financial status of the owner shall not be factor in the court’s determination. The present value of the structure and the costs of repair, alteration, or improvement may be established by affidavits of real estate appraisers with a Georgia appraiser classification as provided in Chapter 39A of Title 43, qualified building contractors, or qualified building inspectors without actual testimony presented. Costs of repair, alteration, or improvement of the structure shall be the cost necessary to bring the structure into compliance with the applicable codes relevant to the cited violations in force in the jurisdiction;

(5) That, if the owner fails to comply with an order to repair or demolish the dwelling, building, or structure, the public officer may cause such dwelling, building, or structure to be repaired, altered, or improved or to be vacated and closed or demolished. Such abatement action shall commence within 270 days after the expiration of time specified in the order for abatement by the owner. Any time during which such action is prohibited by a court order issued pursuant to Code Section 41-2-13 or any other equitable relief granted by a court of competent jurisdiction shall not be counted toward the 270 days in which such abatement action must commence. The public officer shall cause to be posted on the main entrance of the building, dwelling, or structure a placard with the following words:

“This building is unfit for human habitation or commercial, industrial, or business use and does not comply with the applicable codes or has been ordered secured to prevent its use in connection with drug crimes or constitutes an endangerment to public health or safety as a result of unsanitary or unsafe conditions. The use or occupation of this building is prohibited and unlawful.”;

(6) If the public officer has the structure demolished, reasonable effort shall be made to salvage reusable materials for credit against the cost of demolition. The proceeds of any moneys received from the sale of salvaged materials shall be used or applied against the cost of the demolition and removal of the structure, and proper records shall be kept showing application of sales proceeds. Any such sale of salvaged materials may be made without the necessity of public advertisement and bid. The public officer and governing authority are relieved of any and all liability resulting from or occasioned by the sale of any such salvaged materials, including, without limitation, defects in such salvaged materials; and

(7) That the amount of the cost of demolition, including all court costs, appraisal fees, administrative costs incurred by the county tax commissioner or municipal tax collector or city revenue officer, and all other costs necessarily associated with the abatement action, including restoration to grade of the real property after demolition, shall be a lien against the real property upon which such cost was incurred.

(b)(1) The lien provided for in paragraph (7) of subsection (a) of this Code section shall attach to the real property upon the filing of a certified copy of the order requiring repair, closure, or demolition in the office of the clerk of superior court in the county where the real property is located and shall relate back to the date of the filing of the lis pendens notice required under subsection (c) of Code Section 41-2-12. The clerk of superior court shall record and index such certified copy of the order in the deed records of the county and enter the lien on the general execution docket. The lien shall be superior to

all other liens on the property, except liens for taxes to which the lien shall be inferior, and shall continue in force until paid.

(2) Upon final determination of costs, fees, and expenses incurred in accordance with this chapter, the public officer responsible for enforcement actions in accordance with this chapter shall transmit to the appropriate county tax commissioner or municipal tax collector or city revenue officer a statement of the total amount due and secured by said lien, together with copies of all notices provided to interested parties. The statement of the public officer shall be transmitted within 90 days of completion of the repairs, demolition, or closure. It shall be the duty of the appropriate county tax commissioner or municipal tax collector or city revenue officer, who is responsible or whose duties include the collection of municipal taxes, to collect the amount of the lien using all methods available for collecting real property ad valorem taxes, including specifically Chapter 4 of Title 48; provided, however, that the limitation of Code Section 48-4-78 which requires 12 months of delinquency before commencing a tax foreclosure shall not apply. A county tax commissioner shall collect and enforce municipal liens imposed pursuant to this chapter in accordance with Code Section 48-5-359.1. The county tax commissioner or municipal tax collector or city revenue officer shall remit the amount collected to the governing authority of the county or municipality whose lien is being collected.

(3) Enforcement of liens pursuant to this Code section may be initiated at any time following receipt by the county tax commissioner or municipal tax collector or city revenue officer of the final determination of costs in accordance with this chapter. The unpaid lien amount shall bear interest and penalties from and after the date of final determination of costs in the same amount as applicable to interest and penalties on unpaid real property ad valorem taxes. An enforcement proceeding pursuant to Code Section 48-4-78 for delinquent ad valorem taxes may include all amounts due under this chapter.

(4) The redemption amount in any enforcement proceeding pursuant to this Code section shall be the full amount of the costs as finally determined in accordance with this Code section together with interest, penalties, and costs incurred by the governing authority, county tax commissioner, municipal tax collector, or city revenue officer in the enforcement of such lien. Redemption of property from the lien may be made in accordance with the provisions of Code Sections 48-4-80 and 48-4-81.

(c) The governing authority may waive and release any such lien imposed on property upon the owner of such property entering into a contract with the county or municipality agreeing to a timetable for

rehabilitation of the real property or the dwelling, building, or structure on the property and demonstrating the financial means to accomplish such rehabilitation.

(d) Where the abatement action does not commence in the superior court, review of a court order requiring the repair, alteration, improvement, or demolition of a dwelling, building, or structure shall be by direct appeal to the superior court under Code Section 5-3-29.

(e) In addition to the procedures and remedies in this chapter, a governing authority may provide by ordinance that designated public officers may issue citations for violations of state minimum standard codes, optional building, fire, life safety, and other codes adopted by ordinance, and conditions creating a public health hazard or general nuisance, and seek to enforce such citations in a court of competent jurisdiction prior to issuing a complaint in rem as provided in this Code section.

(f) Nothing in this Code section shall be construed to impair or limit in any way the power of the county or municipality to define and declare nuisances and to cause their removal or abatement by summary proceedings or otherwise. (Code 1981, § 41-2-9, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1984, p. 22, § 41; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1989, p. 1161, § 3; Ga. L. 1990, p. 1347, § 1; Ga. L. 1991, p. 94, § 41; Ga. L. 2001, p. 1196, § 3; Ga. L. 2004, p. 907, § 2; Ga. L. 2005, p. 60, § 41/HB 95.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2001, “and” was added at the end of paragraph (a)(6).

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

JUDICIAL DECISIONS

County’s recovery of compensatory damages not authorized. — When a county recovered, identified, and properly disposed of bodies found at a crematorium, O.C.G.A. §§ 31-5-10(d) and 41-2-9(a)(7) did not authorize the county to recover the county’s costs of doing so as compensatory damages in a tort action against the crematorium, funeral homes, and funeral directors alleging negligence and public nuisance; O.C.G.A. §§ 31-5-10 and 41-2-9 do not authorize a county to obtain compensatory damages in a tort action as a means of redress for abating a public nuisance. *Walker County v. Tri-State Crematory*, 284 Ga. App. 34, 643 S.E.2d 324 (2007).

Construction with § 41-2-17. — It was error to hold, based on O.C.G.A. § 41-2-17, that landowners were not entitled under O.C.G.A. § 41-2-9(d) to directly appeal from a municipal court’s demolition order because the city’s nuisance ordinance predated § 41-2-9(a). Section 41-2-9(d) was a specific statute, thereby prevailing over the general statute, § 41-2-17, and as § 41-2-9(d) was unambiguous, the court would not read any limitation onto the statute’s plain meaning. *Yasmine’s Entm’t Hall v. City of Marietta*, 292 Ga. App. 114, 663 S.E.2d 741 (2008).

41-2-10. Determination by public officer that dwelling, building, or structure is unfit or vacant, dilapidated, and being used in connection with the commission of drug crimes.

(a) An ordinance adopted by a county or municipality under Code Sections 41-2-7 through 41-2-9, this Code section, and Code Sections 41-2-11 through 41-2-17 shall provide that the public officer may determine, under existing ordinances, that a dwelling, building, or structure is unfit for human habitation or is unfit for its current commercial, industrial, or business use if he finds that conditions exist in such building, dwelling, or structure which are dangerous or injurious to the health, safety, or morals of the occupants of such dwelling, building, or structure; of the occupants of neighborhood dwellings, buildings, or structures; or of other residents of such county or municipality. Such conditions may include the following (without limiting the generality of the foregoing):

- (1) Defects therein increasing the hazards of fire, accidents, or other calamities;
- (2) Lack of adequate ventilation, light, or sanitary facilities;
- (3) Dilapidation;
- (4) Disrepair;
- (5) Structural defects; and
- (6) Uncleanliness.

Such ordinance may provide additional standards to guide the public officer, or his agents, in determining the fitness of a dwelling, building, or structure for human habitation or for its current commercial, industrial, or business use.

(b) An ordinance adopted by a county or municipality under Code Sections 41-2-7 through 41-2-9, this Code section, and Code Sections 41-2-11 through 41-2-17 shall provide that the public officer may determine, under existing ordinances, that a dwelling, building, or structure is vacant, dilapidated, and being used in connection with the commission of drug crimes upon personal observation or report of a law enforcement agency and evidence of drug crimes being committed. (Code 1981, § 41-2-10, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 4; Ga. L. 1991, p. 94, § 41.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, “municipality. Such” was substituted for “municipality; such” in the introductory paragraph of the Code section.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

41-2-11. Powers of public officers in regard to unfit buildings or structures.

An ordinance adopted by the governing body of the county or municipality may authorize the public officer to exercise such powers as may be necessary or convenient to carry out and effectuate the purpose and provisions of Code Sections 41-2-7 through 41-2-10, this Code section, and Code Sections 41-2-12 through 41-2-17, including the following powers in addition to others granted in Code Sections 41-2-7 through 41-2-10 and Code Sections 41-2-12 through 41-2-17:

(1) To investigate the dwelling conditions in the unincorporated area of the county or in the municipality in order to determine which dwellings, buildings, or structures therein are unfit for human habitation or are unfit for current commercial, industrial, or business use or are vacant, dilapidated, and being used in connection with the commission of drug crimes;

(2) To administer oaths and affirmations, to examine witnesses, and to receive evidence;

(3) To enter upon premises for the purpose of making examinations; provided, however, that such entries shall be made in such manner as to cause the least possible inconvenience to the persons in possession;

(4) To appoint and fix the duties of such officers, agents, and employees as he deems necessary to carry out the purposes of the ordinances; and

(5) To delegate any of his functions and powers under the ordinance to such officers and agents as he may designate. (Code 1981, § 41-2-11, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 5; Ga. L. 1991, p. 94, § 41.)

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

41-2-12. Service of complaints or orders upon parties in interest and owners of unfit buildings or structures.

(a) Complaints issued by a public officer pursuant to an ordinance adopted under Code Sections 41-2-7 through 41-2-11, this Code section, and Code Sections 41-2-13 through 41-2-17 shall be served in the following manner. At least 14 days prior to the date of the hearing, the public officer shall mail copies of the complaint by certified mail or statutory overnight delivery, return receipt requested, to all interested parties whose identities and addresses are reasonably ascertainable. Copies of the complaint shall also be mailed by first-class mail to the

property address to the attention of the occupants of the property, if any, and shall be posted on the property within three business days of filing the complaint and at least 14 days prior to the date of the hearing.

(b) For interested parties whose mailing address is unknown, a notice stating the date, time, and place of the hearing shall be published in the newspaper in which the sheriff's advertisements appear in such county once a week for two consecutive weeks prior to the hearing.

(c) A notice of *lis pendens* shall be filed in the office of the clerk of superior court in the county in which the dwelling, building, or structure is located at the time of filing the complaint in the appropriate court. Such notice shall have the same force and effect as other *lis pendens* notices provided by law.

(d) Orders and other filings made subsequent to service of the initial complaint shall be served in the manner provided in this Code section on any interested party who answers the complaint or appears at the hearing. Any interested party who fails to answer or appear at the hearing shall be deemed to have waived all further notice in the proceedings. (Code 1981, § 41-2-12, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1986, p. 1508, § 3; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1991, p. 94, § 41; Ga. L. 1992, p. 1538, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 1196, § 4; Ga. L. 2004, p. 907, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, "Code Section 41-2-13 through 41-2-17" was changed to "Code Sections 41-2-13 through 41-2-17" in subsection (a).

Pursuant to Code Section 28-9-5, in 2004, "identities and addresses" was substituted for "identity and address" in subsection (a).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that subsection (c) is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001).

41-2-13. Injunctions against order to repair, close, or demolish unfit buildings or structures.

Any person affected by an order issued by the public officer may petition to the superior court for an injunction restraining the public officer from carrying out the provisions of the order and the court may, upon such petition, issue a temporary injunction restraining the public officer pending the final disposition of the cause; provided, however, that such person shall present such petition to the court within 15 days of the posting and service of the order of the public officer. *De novo* hearings shall be had by the court on petitions within 20 days. The court shall hear and determine the issues raised and shall enter such final order or decree as law and justice may require; provided, however, that it shall not be necessary to file bond in any amount before

obtaining a temporary injunction under this Code section. (Code 1981, § 41-2-13, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30.)

41-2-14. Taking of unfit buildings or structures by eminent domain; police power.

Nothing in Code Sections 41-2-7 through 41-2-13, this Code section, and Code Sections 41-2-15 through 41-2-17 shall be construed as preventing the owner or owners of any property from receiving just compensation for the taking of such property by the power of eminent domain under the laws of this state nor as permitting any property to be condemned or destroyed except in accordance with the police power of this state. (Code 1981, § 41-2-14, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1991, p. 94, § 41.)

41-2-15. Authority to use revenues, grants, and donations to repair, close, or demolish unfit buildings or structures.

Any county or municipality is authorized to make such appropriations from its revenues as it may deem necessary and may accept and apply grants or donations to assist it in carrying out the provisions of ordinances adopted in connection with the exercise of the powers granted under this chapter. (Code 1981, § 41-2-15, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41.)

41-2-16. Construction of Code Sections 41-2-7 through 41-2-17 with county or municipal local enabling Act, charter, and other laws, ordinances, and regulations.

Nothing in Code Sections 41-2-7 through 41-2-15, this Code section, and Code Section 41-2-17 shall be construed to abrogate or impair the powers of the courts or of any department of any county or municipality to enforce any provisions of its local enabling Act, its charter, or its ordinances or regulations nor to prevent or punish violations thereof; and the powers conferred by this article shall be in addition to and supplemental to the powers conferred by any other law. (Code 1981, § 41-2-16, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1991, p. 94, § 41.)

41-2-17. Prior ordinances relating to repair, closing, or demolition of unfit buildings or structures.

Ordinances relating to the subject matter of Code Sections 41-2-7 through 41-2-16 and this Code section adopted prior to July 1, 2001, shall have the same force and effect on and after said date as ordinances

adopted subsequent to and by authority of these Code sections. (Code 1981, § 41-2-17, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1991, p. 94, § 41; Ga. L. 2001, p. 1196, § 5.)

Law reviews. — For article, “Local Government Law,” see 53 Mercer L. Rev. 389 (2001).

JUDICIAL DECISIONS

Construction with § 41-2-9. — It was error to hold, based on O.C.G.A. § 41-2-17, that landowners were not entitled under O.C.G.A. § 41-2-9(d) to directly appeal from a municipal court’s demolition order because the city’s nuisance ordinance predated § 41-2-9(a). Section 41-2-9(d) was a specific statute, thereby prevailing over the general statute, § 41-2-17, and as § 41-2-9(d) was unambiguous, the court would not read any limitation onto the statute’s plain meaning. *Yasmine’s Entm’t Hall v. City of Marietta*, 292 Ga. App. 114, 663 S.E.2d 741 (2008).

CHAPTER 3

PLACES USED FOR UNLAWFUL SEXUAL AND DRUG ACTIVITIES

Sec.		Sec.	
41-3-1.	Establishment, maintenance, or use of building, structure, or place for unlawful sexual purposes; evidence of nuisance.		ing action without reasonable ground or cause.
41-3-1.1.	Substantial drug related activity upon real property; knowledge of owner; remedies cumulative.	41-3-7.	Order of abatement generally; breaking and entering or using closed building, structure, or place; fees for removal, sale, or closure of property.
41-3-2.	Action to enjoin nuisance perpetually; temporary restraining order or interlocutory injunction authorized.	41-3-8.	Disposition of proceeds of sale of personal property.
41-3-3.	Dismissal of complaint filed by private citizen; substitution of district attorney or another private citizen for original complainant.	41-3-9.	Suspension of abatement order and release of property; effect of release of property.
41-3-4.	Notice of hearing upon application for temporary restraining order or interlocutory injunction.	41-3-10.	Issuance of permanent injunction; entry and enforcement of judgment; disposition of sums arising from enforcement of judgment.
41-3-5.	Procedure for trial of action generally; admissibility of evidence of general reputation of building, structure, or place.	41-3-11.	Injunction binding throughout judicial circuit in which issued; violation of provisions of injunction deemed contempt.
41-3-6.	Taxation of cost of action against private citizen bringing	41-3-12.	Contempt proceedings; punishment for contempt of court.
		41-3-13.	Abatement of nuisance by state courts and municipal courts of municipalities having population of 15,000 or more.

Cross references. — Penalties for sodomy, prostitution, keeping place of prostitution, and other offenses, T. 16, C. 6. Use of rooms in roadhouses, public dance halls, and other facilities for immoral purposes, § 43-21-61.

JUDICIAL DECISIONS

Nude dancing. — Nuisance statute had no application in the context of an action attempting to enjoin nude dancing at the defendant's establishment. *Fenimore v. State*, 263 Ga. 760, 438 S.E.2d 911 (1993).

Cited in *Davis v. Stark*, 198 Ga. 223, 31 S.E.2d 592 (1944); *Imperial Massage & Health Studio, Inc. v. Lee*, 231 Ga. 482, 202 S.E.2d 426 (1973).

41-3-1. Establishment, maintenance, or use of building, structure, or place for unlawful sexual purposes; evidence of nuisance.

(a) Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, prostitution, sodomy, the solicitation of sodomy, or masturbation for hire shall be guilty of maintaining a nuisance; and the building, structure, or place, and the ground itself in or upon which such lewdness, prostitution, sodomy, the solicitation of sodomy, or masturbation for hire shall be conducted, permitted, carried on, continued, or shall exist, and the furniture, fixtures, and other contents of such building or structure are also declared to be a nuisance and may be enjoined or otherwise abated as provided in this chapter.

(b) The conviction of the owner or operator of any building, structure, or place for any of the offenses stated in subsection (a) of this Code section, based on conduct or an act or occurrence in or on the premises of such building, structure, or place, shall be prima-facie evidence of the nuisance and the existence thereof. (Ga. L. 1917, p. 177, § 1; Code 1933, § 72-301; Ga. L. 1975, p. 402, § 2; Ga. L. 1979, p. 1025, § 1.)

Cross references. — Provisions regarding public nuisance status of premises used in violation of laws relating to obscenity, § 16-12-82.

JUDICIAL DECISIONS

Use of evidentiary standard did not convert action to equitable proceeding. — When a party elected to proceed under former Code 1933, § 72-301 (see now O.C.G.A. § 41-2-5), it was an action at law and using the evidentiary standard contained in former Code 1933, § 72-401 (see now O.C.G.A. § 41-3-1) did not convert the proceeding into an equitable one. *Yield, Inc. v. City of Atlanta*, 145 Ga. App. 172, 244 S.E.2d 32, cert. dismissed, 241 Ga. 593, 247 S.E.2d 764 (1978).

Allegations establishing cause of action. — Petition by the solicitor general (now district attorney) to abate described premises as a public nuisance, alleging that the premises are being maintained and used for the purpose of prostitution and assignation, in violation of this section, et seq., and attaching as a part of the petition affidavits by three persons who testify that the premises have been used as alleged, states a cause of action; a judgment overruling a general demurrer (now motion to dismiss) to the petition is

not erroneous. *Carpenter v. State ex rel. Hains*, 194 Ga. 395, 21 S.E.2d 643 (1942).

Petition, alleging in substance that the defendant was operating a lewd house; was operating and maintaining a gaming house; was illegally selling beer, whiskey and other alcoholic beverages to minors; was maintaining on the defendant's premises a juke box whose loud playing was disturbing the neighborhood and people passing by on the highway; and was providing a gathering place for minors and the general public to drink, dance, and carouse, was sufficient to state a cause of action for abatement of a public nuisance by the solicitor general (now district attorney). *Lee v. Hayes*, 215 Ga. 330, 110 S.E.2d 624 (1959).

Modification of judgment so as to release building and contents. — In a proceeding to abate as a nuisance a described tourist camp owned by the defendant on the ground that "said place and its contents" were being knowingly maintained and used by the defendant for the

purpose of lewdness, assignation, and prostitution, when the judge, by consent trying the case, without a jury, found and decreed that all of the buildings in the tourist camp, with the personalty in each, were used by the defendant "as one plant or combine" for the purpose of lewdness and prostitution, the defendant, after an affirmation of such judgment by the Supreme Court, could not obtain a modification of the judgment so as to release one of the buildings and the building's contents, by showing that this part of the tourist camp was in no way connected with the

alleged nuisance; the original finding and decree as to this matter being conclusive. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

Cited in *Crews v. State ex rel. Hayes*, 215 Ga. 698, 113 S.E.2d 116 (1960); *Whitehead v. Hasty*, 235 Ga. App. 331, 219 S.E.2d 443 (1975); *Yield, Inc. v. City of Atlanta*, 239 Ga. 578, 238 S.E.2d 351 (1977); *660 Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980); *Gateway Books, Inc. v. State*, 247 Ga. 16, 276 S.E.2d 1 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Disorderly Houses, § 40. 58 Am. Jur. 2d, Nuisances, §§ 39-53, 300.

C.J.S. — 66 C.J.S., Nuisances, §§ 67, 71-73, 124.

ALR. — Disorderly character of house as affected by the number of females who reside therein or resort thereto for immoral purposes, 12 ALR 529.

Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex, 51 ALR3d 936.

Massage parlor as nuisance, 80 ALR3d 1020.

41-3-1.1. Substantial drug related activity upon real property; knowledge of owner; remedies cumulative.

(a) As used in this Code section, the term:

(1) "Drug related indictment" means an indictment by a grand jury for an offense involving violation of Code Section 16-13-30; provided, however, that any such indictments which result directly from cooperation between the property owner and a law enforcement agency shall not be considered a drug related indictment for purposes of this Code section.

(2) "Substantial drug related activity" means activity resulting in six or more separate incidents resulting in drug related indictments involving violations occurring within a 12 month period on the same parcel of real property.

(b) Any owner of real property who has actual knowledge that substantial drug related activity is being conducted on such property shall be guilty of maintaining a nuisance, and such real property shall be deemed a nuisance and may be enjoined or otherwise abated as provided in this chapter.

(c) The owner of real property shall be deemed to have actual knowledge of substantial drug related activity occurring on a parcel of

real property if the district attorney of the county in which the property is located notifies the owner in writing of three or more separate incidents within a 12 month period which result in drug related indictments and, after the receipt of such notice and within 12 months of the first of the incidents resulting in a drug related indictment which are the subject of such notice, three or more separate incidents occur which result in drug related indictments.

(d) The provisions of this Code section are cumulative of any other remedies and shall not be construed to repeal any other existing remedies for drug related nuisances. (Code 1981, § 41-3-1.1, enacted by Ga. L. 1996, p. 666, § 1; Ga. L. 1999, p. 467, § 2.)

41-3-2. Action to enjoin nuisance perpetually; temporary restraining order or interlocutory injunction authorized.

Whenever a nuisance is kept, maintained, or exists, as defined in Code Section 41-3-1 or 41-3-1.1, the district attorney, the solicitor-general, city attorney, or county attorney, or any private citizen of the county may maintain an action in the name of the state upon the relation of such attorney or private citizen to enjoin said nuisance perpetually, the person or persons conducting or maintaining the same, and the owner or agent of the building, structure, or place, and the ground itself in or upon which such nuisance exists. In an action to enjoin a nuisance, the court, upon application therefor alleging that the nuisance complained of exists, shall order a temporary restraining order or an interlocutory injunction as provided in Code Section 9-11-65. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-302; Ga. L. 1996, p. 666, § 2; Ga. L. 1999, p. 467, § 3.)

Law reviews. — For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 211 (1999).

JUDICIAL DECISIONS

Cited in *Carpenter v. State ex rel. Gateway Books, Inc. v. State*, 247 Ga. 16, Hains, 194 Ga. 395, 21 S.E.2d 643 (1942); 276 S.E.2d 1 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Disorderly Houses, § 41. 42 Am. Jur. 2d, Injunctions, §§ 17, 248. 268-289. 58 Am. Jur. 2d, Nuisances, §§ 217, 218, 225.

C.J.S. — 43 C.J.S., Injunctions, §§ 17, 20 et seq. 66 C.J.S., Nuisances, §§ 188-191, 209 et seq.

ALR. — Right to enjoin threatened or anticipated nuisance, 7 ALR 749; 26 ALR 937; 32 ALR 724; 55 ALR 880.

Venue of suit to enjoin nuisance, 7 ALR2d 481.

41-3-3. Dismissal of complaint filed by private citizen; substitution of district attorney or another private citizen for original complainant.

If the complaint is filed by a private citizen, it shall not be dismissed except upon filing of a sworn statement by the complainant and his attorney setting forth the reasons why the action should be dismissed and upon approval of the dismissal by the district attorney in writing or in open court. If the court shall be of the opinion that the action ought not to be dismissed, it may direct the district attorney to maintain the action and, if the action is continued more than one term of court, any private citizen of the county or the district attorney may be substituted for the original complainant and directed to maintain the action. (Ga. L. 1917, p. 177, § 3; Code 1933, § 72-306.)

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Dismissal, Discontinuance and Nonsuit, § 11. 42 Am. Jur. 2d, Injunctions, § 211. **C.J.S.** — 27 C.J.S., Dismissal and Nonsuit, § 7. 43A C.J.S., Injunctions, § 334.

41-3-4. Notice of hearing upon application for temporary restraining order or interlocutory injunction.

Notice shall be given to the defendant of the hearing of the application for a temporary restraining order or an interlocutory injunction as provided in Code Section 9-11-65. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-303.)

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, §§ 246, 250. 58 Am. Jur. 2d, Nuisances, §§ 100, 195. **C.J.S.** — 66 C.J.S., Nuisances, §§ 145-148, 182, 183, 189.

41-3-5. Procedure for trial of action generally; admissibility of evidence of general reputation of building, structure, or place.

An action to enjoin a nuisance shall be triable as all other civil cases. In such action, evidence of the general reputation of the building, structure, or place shall be admissible for the purpose of proving the existence of such nuisance. (Ga. L. 1917, p. 177, § 3; Code 1933, § 72-305.)

JUDICIAL DECISIONS

Amendment showing abatement pending suit. — It was error to refuse to allow a verified amendment to the defendant's answer to a petition to enjoin the defendant from conducting a nuisance in violation of this statute; the allegations of the amendment showing that the nui-

sance had been absolutely discontinued a few days after the beginning of the proceeding for injunction, and several weeks before the trial, and that all issues in the proceeding had become moot. *Yancy v. State ex rel. Kelly*, 161 Ga. 138, 129 S.E. 642 (1925).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, § 142 et seq.

C.J.S. — 27 C.J.S., Disorderly Houses, § 14. 66 C.J.S., Nuisances, § 200 et seq.

ALR. — Venue of suit to enjoin nuisance, 7 ALR2d 481.

41-3-6. Taxation of cost of action against private citizen bringing action without reasonable ground or cause.

If the action shall be brought by a private citizen and the court shall find that there was no reasonable ground or cause for the action, the cost may be taxed to such citizen. (Ga. L. 1917, p. 177, § 3; Code 1933, § 72-307.)

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, § 279.

C.J.S. — 43A C.J.S., Injunctions,

§ 252. 66 C.J.S., Nuisances, §§ 38, 227, 228.

41-3-7. Order of abatement generally; breaking and entering or using closed building, structure, or place; fees for removal, sale, or closure of property.

(a) If the existence of a nuisance shall be established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building, structure, or place of all fixtures, furniture, and chattels used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution; provided, however, that if it shall appear to the judge that the furniture and chattels are owned by others than the occupants of the building, structure, or place, he may order the effectual closing of the building, structure, or place against its use for any purpose for a period of one year, unless sooner released.

(b) If any person shall break and enter or use a building, structure, or place directed to be closed, as provided in subsection (a) of this Code section, he shall be punished as for contempt.

(c) For removing and selling the movable property, the sheriff or other duly qualified levying officer of the court shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and, for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. (Ga. L. 1917, p. 177, § 5; Code 1933, § 72-309.)

JUDICIAL DECISIONS

Owner of the personalty is not an owner such as is intended by the phrase “owned by others than the occupants” and as against the owner the personal property shall be removed from the building or place where the nuisance was maintained, and shall be sold. In this respect the statute is mandatory, and the defendant must abide the sale and cannot prevent the sale by paying the costs directly. This, however, is only one of the penalties contemplated; for the “building or place” may itself be closed and kept “closed for a period of one year, unless sooner released.” *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

Reference in former Code 1933, § 72-309 (see now O.C.G.A. § 41-3-7), to ownership of personalty by others than the “occupants,” and the word “owner,” as it appeared in former Code 1933, § 72-311 (see now O.C.G.A. § 41-3-9), providing for bond, did not contemplate a situation in which the owner is personally the party who maintained the nuisance. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

First part of this section, as to what the judgment shall contain, simply declares in express terms that it shall include direction for removal and sale of the personalty, while the meaning of the proviso is, that although the personal property may be owned by others than the occupants, so that it cannot be sold under the abatement judgment, the court may still order the effective closing of the building or place. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

Evidence materially affecting public interest. — If the judge has discretion to allow the building or buildings reopened within less than one year on petition of the defendant, it is not an arbitrary discretion; and before the judge could properly exercise any discretion in such matter, some new fact or condition materially affecting the public interest should be introduced. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

Cited in *Fuller v. Fuller*, 197 Ga. 719, 30 S.E.2d 600 (1944).

RESEARCH REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d, Injunctions, §§ 314-318. 58 Am. Jur. 2d, Nuisances, §§ 324, 325, 327, 368, 374, 376, 422, 428.

C.J.S. — 43A C.J.S., Injunctions, § 285 et seq. 66 C.J.S., Nuisances, §§ 93, 284 et seq., 347 et seq., 359 et seq., 406 et seq..

41-3-8. Disposition of proceeds of sale of personal property.

The proceeds of the sale of the personal property, as provided in Code Section 41-3-7, shall be applied in payment of the cost of the action and abatement, and the balance, if any, shall be paid to the defendant. (Ga. L. 1917, p. 177, § 6; Code 1933, § 72-310.)

RESEARCH REFERENCES

C.J.S. — 66 C.J.S., Nuisances, § 209 et seq.

41-3-9. Suspension of abatement order and release of property; effect of release of property.

(a) If the owner of the building, structure, or place ordered abated shall appear and pay all costs of the proceedings and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, conditioned that he will immediately abate the nuisance and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of the good faith of the owner, order the building, structure, or place closed under the order of abatement to be delivered to said owner and the order of abatement suspended so far as it may relate to said property.

(b) The release of the property under subsection (a) of this Code section shall not release it from any judgment lien, penalty, or liability to which it may be subject by law. (Ga. L. 1917, p. 177, § 7; Code 1933, § 72-311.)

JUDICIAL DECISIONS

“Owner.” — Reference in former Code 1933, § 72-309 (see now O.C.G.A. § 41-3-7), to ownership of personalty by others than the “occupants,” and the word “owner,” as it appeared in former Code 1933, § 72-311 (see now O.C.G.A. § 41-3-9), providing for bond, did not contemplate a situation in which the owner is himself the party who maintained the nuisance. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

This section does not apply to an owner who personally used the property for the purposes condemned by the statute, and against whom as the actual offender the abatement judgment was rendered. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

Partial compliance with judgment. — When in a final decree it was ordered that given buildings be closed pending further order of the court, that the personal property therein be removed and sold, and that judgment be rendered against the defendant and in favor of the state for \$300.00, with special lien on the premises as provided by law, the defendant, in paying the \$300.00 and the cost of the proceeding, would comply with the judgment only in part, and would not thereby acquire any right to a release of the realty or personalty from the order of abatement. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

RESEARCH REFERENCES

C.J.S. — 43A C.J.S., Injunctions, § 371.

41-3-10. Issuance of permanent injunction; entry and enforcement of judgment; disposition of sums arising from enforcement of judgment.

- (a) Whenever a permanent injunction is issued against any person for maintaining a nuisance as described in Code Section 41-3-1 or against any owner of the building, structure, or place knowingly kept or used for the purposes prohibited by this chapter, the judge granting the injunction shall, at the same time, enter judgment against the person, firm, or corporation owning said building, structure, or place in the sum of \$300.00; and said judgment shall be a special lien upon the premises complained of and the furniture and fixtures therein and shall as against the property rank from date with all other judgments or liens as provided by law.
- (b) The judgment provided for in subsection (a) of this Code section shall issue in the name of the state and be enforced as other judgments in this state. The lien of the judgment upon the property used for the purpose of maintaining the nuisance shall not relieve the person maintaining the nuisance or the owner of the building, structure, or place from any of the other penalties provided by law.
- (c) All sums arising from the enforcement of the judgment provided for in subsection (a) of this Code section shall be paid into the treasury of the county in which said judgment is entered and become part of the general funds of said county. (Ga. L. 1917, p. 177, § 8; Code 1933, § 72-312.)

JUDICIAL DECISIONS

- Knowledge by owner as to use of building.** — Knowledge on the part of the owner that the premises were being used, or that the lessee when leasing the premises intended to use the premises, for the illegal purposes set forth in the act, is essential in order to subject the owner to the burden of a permanent injunction and

the penalty of the fine prescribed. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).
- Satisfaction of a money judgment only in part** would not affect the remainder or give a new right to the defendant. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

41-3-11. Injunction binding throughout judicial circuit in which issued; violation of provisions of injunction deemed contempt.

When an injunction is granted, it shall be binding on the defendant throughout the judicial circuit in which it is issued; and any violation of the provisions of the injunction shall be a contempt of court. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-304.)

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 309, 315.

C.J.S. — 43A C.J.S., Injunctions, § 354.

ALR. — Reversal, modification, dismissal, dissolution, or resettlement of injunction order or judgment as affecting

prior disobedience as contempt, 148 ALR 1024.

Venue of suit to enjoin nuisance, 7 ALR2d 481.

Use of affidavits to establish contempt, 79 ALR2d 657.

41-3-12. Contempt proceedings; punishment for contempt of court.

(a) In the event of the violation of any injunction granted under this chapter, the court may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information, under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to be issued for the arrest of the offender. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses.

(b) A party found guilty of violating the provisions of an injunction shall be punished as for contempt in the discretion of the judge. (Ga. L. 1917, p. 177, § 4; Code 1933, § 72-308.)

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Nuisances, §§ 325-327.

C.J.S. — 43A C.J.S., Injunctions, § 285 et seq. 66 C.J.S., Nuisances, § 421 et seq.

ALR. — Reversal, modification, dismissal, dissolution, or resettlement of in-

junction order or judgment as affecting prior disobedience as contempt, 148 ALR 1024.

Use of affidavits to establish contempt, 79 ALR2d 657.

41-3-13. Abatement of nuisance by state courts and municipal courts of municipalities having population of 15,000 or more.

In addition to the remedies provided for by Code Sections 41-3-2 through 41-3-12, state courts and the municipal courts of municipalities having a population of 15,000 or more according to the United States decennial census of 1970 or any future such census, when the nuisance exists within the corporate limits of such municipalities, shall have jurisdiction to hear and determine the question of the existence of the nuisance defined by Code Section 41-3-1 and, if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or marshal of any such court or his deputy. (Code 1933, § 72-313, enacted by Ga. L. 1979, p. 1025, § 2.)

TITLE 42

PENAL INSTITUTIONS

Chap.

1. General Provisions, 42-1-1 through 42-1-19.
2. Board and Department of Corrections, 42-2-1 through 42-2-16.
3. Georgia Building Authority (Penal), 42-3-1 through 42-3-32.
[Repealed]
4. Jails, 42-4-1 through 42-4-105.
5. Correctional Institutions of State and Counties, 42-5-1 through 42-5-125.
6. Detainers, 42-6-1 through 42-6-25.
7. Treatment of Youthful Offenders, 42-7-1 through 42-7-9.
8. Probation, 42-8-1 through 42-8-159.
9. Pardons and Paroles, 42-9-1 through 42-9-90.
10. Correctional Industries, 42-10-1 through 42-10-5.
11. Interstate Corrections Compact, 42-11-1 through 42-11-3.
12. Prison Litigation Reform, 42-12-1 through 42-12-9.
13. International Transfer of Prisoners, 42-13-1 through 42-13-2.

Cross references. — Securing of attendance of prisoners at trials, § 24-13-60 et seq. Criminal Justice Coordinating Council, T. 35, C. 6A. Power of municipal

corporations to confine persons convicted of violating municipal ordinances, § 36-30-8.

CHAPTER 1

GENERAL PROVISIONS

Article 1

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Article 2

Sexual Offender Registration Review Board

42-1-12.	State Sexual Offender Registry.
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42-1-16.	Definitions; employment restrictions for sexual offenders; penalties.
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42-1-19.	Petition for release from registration requirements.

ARTICLE 1

INMATE POLICIES

Editor's notes. — Ga. L. 2006, p. 379, § 24/HB 1059, designated Code Sections 42-1-1 through 42-1-11 as Article 1 of this chapter.

Law reviews. — For article on 2006 amendment of this article, see 23 Ga. St. U.L. Rev. 11 (2006).

42-1-1. Definitions.

Except as specifically provided otherwise, as used in this title, the term:

(1) “Board” means the Board of Corrections.

(2) “Case plan” means an individualized accountability and behavior change strategy for a probationer, as applicable.

(3) “Commissioner” means the commissioner of corrections.

(4) “Criminal risk factors” means characteristics and behaviors that affect a person’s risk for committing future crimes and include, but are not limited to, antisocial behavior, antisocial personality, criminal thinking, criminal associates, having a dysfunctional family, having low levels of employment or education, poor use of leisure and recreation time, and substance abuse.

(5) “Department” means the Department of Corrections.

(6) “Graduated sanctions” means:

(A) Verbal and written warnings;

(B) Increased restrictions and reporting requirements;

(C) Community service or work crews;

(D) Referral to substance abuse or mental health treatment or counseling programs in the community;

(E) Increased substance abuse screening and monitoring;

(F) Electronic monitoring, as such term is defined in Code Section 42-8-151; and

(G) An intensive supervision program.

(7) “Risk and needs assessment” means an actuarial tool, approved by the board and validated on a targeted population, scientifically proven to determine a person’s risk to recidivate and to identify criminal risk factors that, when properly addressed, can reduce that person’s likelihood of committing future criminal behavior. (Ga. L. 1921, p. 243, §§ 3, 5; Code 1933, §§ 27-504, 27-9903; Ga. L. 2012, p. 899, § 7-1/HB 1176; Ga. L. 2013, p. 222, § 17/HB 349.)

The 2012 amendment, effective July 1, 2012, substituted the present provisions of this Code section for the former provisions, which read: “(a) No employee of a penal institution may give advice to an inmate regarding the name or the employment of an attorney at law in any

case where the inmate is confined in a penal institution or receive any sum of money paid as fees or otherwise to attorneys at law in a criminal case or cases against any inmate with which they may be connected in any capacity.

“(b) Any person who violates this Code

section shall be guilty of a misdemeanor.” See editor’s note for applicability.

The 2013 amendment, effective July 1, 2013, deleted former paragraph (1), which read: “‘Active supervision’ means the period of a probated sentence in which a probationer actively reports to his or her probation supervisor or is otherwise under the direct supervision of a probation supervisor.”; deleted former paragraph (2), which read: “‘Administrative supervision’ means the period of probation supervision that has reduced supervision and reporting requirements commensurate with and that follows active supervision but that is prior to the termination of a sentence.”; and redesignated former paragraphs (3) through (9) as present paragraphs (1) through (7), respectively. See editor’s note for applicability.

Cross references. — Solicitation on behalf of attorneys generally, § 15-19-55.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall

become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.”

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article, “Appeal and Error: Appeal or Certiorari by State in Criminal Cases,” see 30 Ga. St. U.L. Rev. 17 (2013).

RESEARCH REFERENCES

C.J.S. — 7A C.J.S., Attorney and Client, §§ 167, 170, 171. 8 C.J.S., Bail, §§ 2, 3, 4.

ALR. — Propriety of telephone testimony or hearings in prison proceedings, 9 ALR5th 451.

42-1-2. Reward for information leading to capture of escaped inmate of penal institution under jurisdiction of Board of Corrections.

(a) Any person, other than a law enforcement officer, who furnishes information leading to the capture of an escaped inmate from a penal institution under the jurisdiction of the Board of Corrections may receive a reward of up to \$200.00 which shall be payable at the time the escaped inmate is returned to the custody of the Board of Corrections. The commissioner of corrections, at his discretion, may pay the reward to any person from funds appropriated or otherwise available to the Department of Corrections.

(b) When more than one person furnishes information which would entitle them to receive the rewards pursuant to subsection (a) of this Code section, the reward shall be paid to the first person furnishing the information; and, if more than one person furnishes the information at the same time, the reward shall be prorated among all persons furnishing such information. (Code 1933, § 27-101.3, enacted by Ga. L.

1972, p. 574, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

Cross references. — Criminal penalties relating to escape of persons from lawful custody, §§ 16-10-52 and 16-10-53. Reward for detection or apprehension of

person committing felony, for information leading to identification of person who murders law enforcement officer, §§ 45-12-35 through 45-12-37.

RESEARCH REFERENCES

Am. Jur. 2d. — 67 Am. Jur. 2d, Rewards, §§ 9-13, 26, 30-32.

Am. Jur. Pleading and Practice Forms. — 21B Am. Jur. Pleading and Practice Forms, Rewards, § 2.

ALR. — Construction of statute authorizing public authorities to offer rewards for arrest and conviction of persons guilty of crime, 86 ALR 579.

Right to reward of furnisher of information leading to arrest and conviction of offenders, 100 ALR2d 573.

Validity, construction, and application of statutes regulating bail bond business, 13 ALR3d 618.

Knowledge of reward as condition of right thereto, 86 ALR3d 1142.

Validity, construction, and application of state statutory requirement that person convicted of sexual offense in other jurisdiction register or be classified as sexual offender in forum state, 34 ALR6th 171.

42-1-3. Defendant sentenced to death or life imprisonment not to be made trusty during time case on appeal; manner of confinement of defendant.

Any defendant who has been convicted of a felony and sentenced to death or life imprisonment shall not be made a trusty at any penal institution or facility in this state during the time that his case is on appeal. The defendant shall be confined in the same manner as other prisoners. (Ga. L. 1981, p. 1429, § 2.)

Cross references. — Death penalty generally, § 17-10-30 et seq.

42-1-4. Work-release programs for county prisoners.

(a) Any person sentenced to confinement as a county prisoner under paragraph (1) of subsection (a) of Code Section 17-10-3 or otherwise sentenced to confinement as a county prisoner may, if there is reasonable cause to believe that he will honor his trust, be allowed to participate in a work-release program as authorized by this Code section. Participation in a work-release program shall be voluntary on the part of the inmate.

(b) When an inmate receives permission to participate in a work-release program, the limits of the place of the confinement of the inmate shall be expanded by allowing the inmate under prescribed conditions to work at paid employment or participate in a training

program in the community while continuing as an inmate of the institution to which he is committed. The willful failure of an inmate to remain within the extended limits of his confinement or to return within the prescribed time to the institution shall constitute an escape from the institution and shall be punished as provided in Code Section 16-10-52.

(c) If there is reasonable cause to believe that an inmate will honor his trust, the inmate may be authorized to participate in a work-release program by:

(1) The sentencing judge at the time of sentencing; or

(2) The sheriff, warden, or other official in charge of the institution to which the inmate is committed if written approval is obtained from the sentencing judge.

(d) An inmate authorized to participate in a work-release program under this Code section shall comply with all rules and regulations promulgated by the institution in which he is confined relative to the handling, disbursement, and holding in trust of all funds earned by the inmate while under the jurisdiction of the institution. An amount determined to be the cost of the inmate's keep and confinement shall be deducted from the earnings of each inmate, and such amount shall be deposited in the treasury of the county. After deduction for keep and confinement the official in charge of the institution shall:

(1) Allow the inmate to draw from the balance a reasonable sum to cover his incidental expenses;

(2) Retain to the inmate's credit an amount as deemed necessary to accumulate a reasonable sum to be paid to him on his release from the institution; and

(3) Cause to be paid any additional balance as is needed for the support of the inmate's dependents.

(e) No inmate participating in a work-release program under this Code section shall be deemed to be an agent, employee, or involuntary servant of the county while working or participating in training or going to and from his place of employment or training. (Code 1981, § 42-1-4, enacted by Ga. L. 1985, p. 1259, § 1.)

Cross references. — Work-release, educational, and habilitative programs for county prisoners, § 42-1-9.

Editor's notes. — Both Ga. L. 1985, p.

1259, § 1 and Ga. L. 1985, p. 1483, § 1 enacted a Code Section 42-1-4. The former has been set out as Code Section 42-1-4 and the latter as Code Section 42-1-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 139.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 29, 59.

42-1-5. Use of inmate for private gain.

(a) As used in this Code section, the term:

(1) “Custodian” means a warden, sheriff, jailer, deputy sheriff, police officer, or any other law enforcement officer having actual custody of an inmate.

(2) “Inmate” means any person who is lawfully incarcerated in a penal institution.

(3) “Penal institution” means any place of confinement for persons accused of or convicted of violating a law of this state or an ordinance of a political subdivision of this state.

(b) It shall be unlawful for a custodian of an inmate of a penal institution to use such inmate or allow such inmate to be used for any purpose resulting in private gain to any individual.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(d) This Code section shall not apply to:

(1) Work on private property because of natural disasters;

(1.1) Work on private property as a form of victim compensation in accordance with Chapter 15A of Title 17;

(2) Work or other programs or releases which have the prior approval of the board or commissioner of corrections;

(3) Community service work programs;

(4) Work-release programs; or

(5) Work programs authorized by Article 6 of Chapter 5 of this title. (Code 1981, § 42-1-4, enacted by Ga. L. 1985, p. 1483, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 2003, p. 252, § 2; Ga. L. 2005, p. 1222, § 3/HB 58.)

Code Commission notes. — Both Ga. L. 1985, p. 1259 and Ga. L. 1985, p. 1483 enacted a Code Section 42-1-4. Additionally, Ga. L. 1985, p. 1483 contained “board or commissioner of offender rehabilitation” in paragraph (2) of subsection (d). Pursuant to Code Section 28-9-5, this Code section has been renumbered Code

Section 42-1-5 and “offender rehabilitation” changed to “corrections.”

Editor’s notes. — Ga. L. 2005, p. 1222, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Working Against Recidivism Act.’”

Ga. L. 2005, p. 1222, § 2, not codified by

the General Assembly, provides that: "The General Assembly finds and declares that:

"(1) Many persons sentenced to confinement for criminal offenses commit additional criminal offenses after release from confinement, and such recidivism is a serious danger to public safety and a major source of expense to the state;

"(2) Under the appropriate conditions and limitations, work programs of voluntary labor by inmates of state and county correctional institutions for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers provide substantial public benefits by:

"(A) Providing job experience and skills to participating inmates;

"(B) Allowing participating inmates to accumulate savings available for their use when released from the correctional institution;

"(C) Lowering recidivism rates;

"(D) Generating taxes from inmate income;

"(E) Reducing the cost of incarceration by enabling participating inmates to pay room and board; and

"(F) Providing participating inmates income to pay fines, restitution, and family support;

"(3) Appropriate conditions and limitations for voluntary labor by inmates for such work programs include but are not limited to:

"(A) Assurance that inmates' work is voluntary;

"(B) Payment of inmates at wages at a

rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

"(C) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector workers;

"(D) Selection of participating inmates with careful attention to security issues;

"(E) Appropriate supervision of inmates during travel or employment outside the correctional institution;

"(F) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

"(G) Consultations with local private employers that may be economically impacted; and

"(H) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

"(4) Requirements for the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations are sufficient to ensure appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers."

JUDICIAL DECISIONS

Penal institution. — Evidence was sufficient for a reasonable fact-finder to find beyond a reasonable doubt that the defendant committed the offense of riot in a penal institution because the state introduced evidence of the defendant's legal confinement, and the state's evidence regarding the prisoners housed at the county jail would have been sufficient for

the jury to conclude that the jail constituted a penal institution within the meaning of O.C.G.A. § 16-10-56, and as defined in the jury charge, had the trial court not ruled on that issue as a matter of law. *Paul v. State*, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

Cited in *Smith v. Deering*, 880 F. Supp. 816 (S.D. Ga. 1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 141 et seq.

42-1-6. Injury or contact by inmate presenting possible threat of transmission of communicable disease.

If any inmate of any state or county correctional institution, county or municipal jail, or other similar facility, while such inmate is in custody or in the process of being taken into custody, injures or has injured or contacts or has contacted a law enforcement officer, correctional officer, firefighter, emergency medical technician, or other person in such a manner as to present a possible threat of transmission of a communicable disease to the person so injured or contacted, then the warden, jailer, or other official having charge of such inmate may take all reasonable steps to determine whether the inmate has a communicable disease capable of being transmitted by the injury or contact involved. Such steps may include, but shall not be limited to, any appropriate medical examination of or collection of medical specimens from the inmate. In the event an inmate refuses to cooperate in any such procedures, the warden, jailer, or other official may apply to the superior court of the county for an order authorizing the use of any degree of force reasonably necessary to complete such procedures. Upon a showing of probable cause that the injury presents the threat of transmission of a communicable disease, the court shall issue an order authorizing the petitioner to use reasonable measures to perform any medical procedures reasonably necessary to ascertain whether a communicable disease has been transmitted. In addition to any other grounds sufficient to show probable cause for the issuance of such an order, such probable cause may be conclusively established by evidence of the injury or contact in question and a statement by a licensed physician that the nature of the injury or contact is such as to present a threat of transmission of a communicable disease if the inmate has such a disease. The cost of any procedures carried out under this Code section shall be borne by the jurisdiction having custody of the inmate. (Code 1981, § 42-1-6, enacted by Ga. L. 1987, p. 1446, § 1; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11.)

42-1-7. Notification to transporting law enforcement agency of inmate's or patient's infectious or communicable disease.

(a) For the purposes of this Code section, the term "infectious or communicable disease" shall include infectious hepatitis, tuberculosis, influenza, measles, chicken pox, meningitis, HIV as defined in Code

Section 31-22-9.1, or any venereal disease enumerated in Code Section 31-17-1.

(b) Notwithstanding any other provision of law, any state or county correctional institution, municipal or county detention facility, or any facility as defined in Code Section 37-3-1 shall notify any state or local law enforcement agency required to transport an inmate or patient if such inmate or patient has been diagnosed as having an infectious or communicable disease. Notification shall be limited to the fact that such inmate or patient has an infectious or communicable disease and whether such disease is airborne or transmissible by blood or other body fluids; provided, however, that the specific disease shall not be disclosed. The Department of Public Health shall provide a guide for appropriate precautions to be taken by any person or persons transporting such inmate or patient and shall develop a form to be used for the purpose of ensuring that such precautions are taken.

(c) Information released or obtained pursuant to this Code section shall be privileged and confidential and shall only be released or obtained by the institutions, facilities, or agencies who are parties to the transportation of the patient or inmate. Any person making an unauthorized disclosure of such information shall be guilty of a misdemeanor. (Code 1981, § 42-1-7, enacted by Ga. L. 1991, p. 1319, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

Code Commission notes. — Ga. L. 1991, p. 1319, § 1, Ga. L. 1991, p. 1348, § 1, and Ga. L. 1991, p. 1352, § 1, all purport to enact Code Section 42-1-7. Pursuant to Code Section 28-9-5, Ga. L. 1991, p. 1348, § 1, has been renumbered as

Code Section 42-1-8 and Ga. L. 1991, p. 1352, § 1, has been renumbered as Code Section 42-1-9.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

42-1-8. Home arrest program.

(a) As used in this Code section, the term:

(1) “Educational program” means a program of learning recognized by the State Board of Education.

(2) “Habilitative program” means and includes an alcohol or drug treatment program, mental health program, family counseling, community service, or any other community program ordered or approved by the court having jurisdiction over the offender or by the sheriff.

(3) “Home arrest” means an electronic monitoring of an offender at a residence approved and accepted by the court, the sheriff, or the director or administrator of the home arrest program.

(b) Notwithstanding the provisions of Code Section 42-1-4, any person who is confined in a county jail (1) after conviction and

sentencing, (2) pending completion of a presentencing report, or (3) after return for a violation of the terms of probation may, in the discretion of the sheriff and subject to the eligibility requirements set forth in subsection (d) of this Code section, be assigned to a home arrest program under supervision of the sheriff. If it appears to the court that an offender subject to its jurisdiction is a suitable candidate for a home arrest program, the court may, subject to the eligibility requirements of subsection (d) of this Code section, order the offender to a home arrest program. Further, the sheriff or the court may authorize the offender to participate in educational or other habilitative programs designed to supplement home arrest.

(c) Whenever the sheriff assigns an offender to home arrest, the court which sentenced such offender or before which such offender's case is pending shall be notified in writing by the sheriff or the director or administrator of the home arrest program to which the offender is assigned of the offender's place of employment and the location of any educational or habilitative program in which the offender participates. The court, in its discretion, may revoke the authority for any offender to participate in home arrest, whether such offender was assigned to home arrest by the court or the sheriff. The sheriff or home arrest director or administrator may enter into an agreement to accept into the local home arrest program offenders who are sentenced to home arrest or who have met all home arrest standards.

(d) In order to qualify for assignment to a home arrest program, an offender:

(1) May not be subject to any outstanding warrants or orders from any other court or law enforcement agency;

(2) Shall not have any criminal record or any history within the preceding five years of any assaultive offenses of an aggravated nature, including, but not limited to, aggravated assault; aggravated battery; rape; child molestation; robbery; trafficking or distribution of a controlled substance or marijuana; homicide by vehicle; felony bail-jumping; or escape; or

(3) May not have any life-threatening illnesses or disabilities that would interfere with the ability to work on a regular schedule.

(e) An offender's employment under this Code section shall be with a legitimate, recognized, and established employer. An offender assigned to a home arrest program who, without proper authority, leaves his home or the work area to which he is assigned, who leaves or fails to attend an assigned educational or other rehabilitative program, or who leaves the vehicle or route of travel in going to or returning from his assigned place of work shall be guilty of a misdemeanor. If the offender leaves the county or the area of restriction, he may be found guilty of

escape under Code Section 16-10-52. An offender who is found guilty of a misdemeanor under this subsection or of escape shall be ineligible for further participation in a home arrest program during his current term of confinement.

(f) Any wages earned by an offender in home arrest under this Code section may, upon order of the court or the sheriff, be paid to the director or administrator of the home arrest program after standard payroll deductions required by federal or state law have been withheld. Distribution of such wages shall be made for the following purposes:

(1) To defray the cost of home arrest electronic monitoring equipment and supervision provided by the local jail or detention center, or to pay for any damage to the monitoring equipment in the offender's possession or the failure to return the equipment to the program;

(2) To pay travel and other such expenses of the offender necessitated by his home arrest employment or participation in an educational or rehabilitative program;

(3) To provide support and maintenance for the offender's dependents or to make payments to the local department of family and children services or probation, as appropriate, on behalf of any offender's dependents receiving public assistance;

(4) To pay any fines, restitution, or other costs ordered by the court; and

(5) Any balance remaining after payment of costs and expenses listed in paragraphs (1) through (4) of this subsection shall be retained to the credit of the offender and shall be paid to him upon release from confinement.

(g) No offender participating in home arrest pursuant to this Code section shall be deemed to be an agent, employee, or involuntary servant of the county while working or participating in educational or other habilitative programs or while traveling to or from the place of employment.

(h) Local jails shall qualify for compensation for costs of incarceration of all persons pursuant to this Code section, less any payments from the offender pursuant to subsection (f) of this Code section. (Code 1981, § 42-1-8, enacted by Ga. L. 1991, p. 1348, § 1.)

Code Commission notes. — Ga. L. 1991, p. 1319, § 1, Ga. L. 1991, p. 1348, § 1, and Ga. L. 1991, p. 1352, § 1, all purport to enact Code Section 42-1-7. Pursuant to Code Section 28-9-5, Ga. L. 1991, p. 1348, § 1, has been renumbered as

Code Section 42-1-8 and Ga. L. 1991, p. 1352, § 1, has been renumbered as Code Section 42-1-9.

Law reviews. — For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 155 (1992).

42-1-9. Work-release, educational, and habilitative programs for county prisoners.

(a) As used in this Code section, the term:

(1) "Educational program" means a program of learning recognized by the State Board of Education.

(2) "Habilitative program" means and includes an alcohol or drug treatment program, mental health program, family counseling, community service, or any other community program ordered or approved by the court having jurisdiction over the offender or by the sheriff.

(3) "Work release" means full-time employment or participation in an acceptable and suitable vocational training program.

(b) Notwithstanding the provisions of Code Section 42-1-4, any person who is confined in a county jail (1) after conviction and sentencing, (2) pending completion of a presentencing report, or (3) after return for a violation of the terms of probation may, in the discretion of the sheriff and subject to the eligibility requirements set forth in subsection (d) of this Code section, be assigned to a work-release program under supervision of the sheriff. If it appears to the court that an offender subject to its jurisdiction is a suitable candidate for a work-release program, the court may, subject to the eligibility requirements of subsection (d) of this Code section, order the offender to a work-release program. Further, the sheriff or the court may authorize the offender inmate to participate in educational or other habilitative programs designed to supplement work release.

(c) Whenever the sheriff assigns an inmate to work release, the court which sentenced such offender or before which such offender's case is pending shall be notified in writing by the sheriff or the director or administrator of the work-release program to which the offender is assigned of the offender's place of employment and the location of any educational or habilitative program in which the offender participates. The court, in its discretion, may revoke the authority for any inmate to participate in work release, whether such inmate was assigned to work release by the court or the sheriff. The sheriff or work-release director or administrator may enter into an agreement to accept into the local work-release program inmates who are sentenced to work release or who have met all work-release standards.

(d) In order to qualify for assignment to a work-release program, an offender:

(1) May not be subject to any outstanding warrants or orders from any other court or law enforcement agency;

(2) Shall not have any criminal record or any history within the preceding five years of any assaultive offenses of an aggravated nature, including, but not limited to, aggravated assault; aggravated battery; rape; child molestation; robbery; trafficking or distribution of a controlled substance or marijuana; homicide by vehicle; felony bail-jumping; or escape; or

(3) May not have any life-threatening illnesses or disabilities that would interfere with the ability to work on a regular schedule.

(e) An inmate's employment under this Code section shall be with a legitimate, recognized, and established employer. An inmate assigned to a work-release program who, without proper authority, leaves the work area or site to which he is assigned, who leaves or fails to attend an assigned educational or other rehabilitative program, or who leaves the vehicle or route of travel in going to or returning from his assigned place of work shall be guilty of a misdemeanor. An offender who is found guilty of misdemeanor escape in accordance with this subsection shall be ineligible for further participation during his current term of confinement.

(f) Any wages earned by an inmate in work release under this Code section may, upon order of the court or the sheriff, be paid to the director or administrator of the work-release program after standard payroll deductions required by federal or state law have been withheld. Distribution of such wages shall be made for the following purposes:

(1) To defray the cost of the inmate's keep, confinement, and supervision, which sums shall be paid into the general treasury;

(2) To pay travel and other such expenses of the inmate necessitated by his work-release employment or participation in an educational or rehabilitative program;

(3) To provide support and maintenance for the inmate's dependents or to make payments to the local department of family and children services or probation, as appropriate, on behalf of any inmate's dependents receiving public assistance;

(4) To pay any fines, restitution, or other costs ordered by the court; and

(5) Any balance remaining after payment of costs and expenses listed in paragraphs (1) through (4) of this subsection shall be retained to the credit of the inmate and shall be paid to him upon release from confinement.

(g) No inmate participating in work release pursuant to this Code section shall be deemed to be an agent, employee, or involuntary servant of the county while working or participating in educational or

other habilitative programs or while traveling to or from the place of employment.

(h) Local jails shall qualify for compensation for costs of incarceration of all persons pursuant to this Code section, less any payments from the inmate pursuant to subsection (f) of this Code section. (Code 1981, § 42-1-9, enacted by Ga. L. 1991, p. 1352, § 1.)

Cross references. — Work-release programs for county prisoners, § 42-1-4.

Code Commission notes. — Ga. L. 1991, p. 1319, § 1, Ga. L. 1991, p. 1348, § 1, and Ga. L. 1991, p. 1352, § 1, all purport to enact Code Section 42-1-7. Pursuant to Code Section 28-9-5, Ga. L. 1991, p. 1348, § 1, has been renumbered as Code Section 42-1-8 and Ga. L. 1991, p. 1352, § 1, has been renumbered as Code Section 42-1-9.

Pursuant to Code Section 28-9-5, in 1991, “work-release program” was substituted for “work release program” in three places in subsection (b), twice in subsec-

tion (c), in subsections (d) and (e), in the introductory language of subsection (f), and in paragraph (f)(2); and “work-release” was substituted for “work release” preceding “director” and “standards” in subsection (c).

Administrative rules and regulations. — Work Standards, Official Compilation of the Rules and Regulations of the State of Georgia, Boards of Corrections, Institutional and Center Operations, Chapter 125-3-5.

Law reviews. — For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 155 (1992).

JUDICIAL DECISIONS

Cited in *Legere v. State*, 299 Ga. App. 640, 683 S.E.2d 155 (2009).

42-1-10. Preliminary urine screen drug tests.

(a) Any probation officer, parole officer, or other official or employee of the Department of Corrections who supervises any person covered under the provisions of paragraphs (1) through (7) of this subsection shall be exempt from the provisions of Chapter 22 of Title 31 for the limited purposes of administering a preliminary urine screen drug test to any person who is:

(1) Incarcerated;

(2) Released as a condition of probation for a felony or misdemeanor;

(3) Released as a condition of conditional release;

(4) Released as a condition of parole;

(5) Released as a condition of provisional release;

(6) Released as a condition of pretrial release; or

(7) Released as a condition of control release.

(b) The Department of Corrections and the State Board of Pardons and Paroles shall develop a procedure for the performance of prelimi-

nary urine screen drug tests in accordance with the manufacturer's standards for certification. Probation officers, parole officers, or other officials or employees of the Department of Corrections who are supervisors of any person covered under paragraphs (1) through (7) of subsection (a) of this Code section shall be authorized to perform preliminary urine screen drug tests in accordance with such procedure. Such procedure shall include instructions as to a confirmatory test by a licensed clinical laboratory where necessary. (Code 1981, § 42-1-10, enacted by Ga. L. 1992, p. 3234, § 1.)

42-1-11. Notification of crime victim of impending release of offender from imprisonment.

(a) As used in this Code section, the term:

(1) "Crime" means an act committed in this state which constitutes any violation of Chapter 5 of Title 16, relating to crimes against persons; Chapter 6 of Title 16, relating to sexual offenses; Article 1, Article 1A, or Article 3 of Chapter 7 of Title 16, relating to burglary, home invasion, and arson; or Article 1 or Article 2 of Chapter 8 of Title 16, relating to offenses involving theft and armed robbery.

(2) "Crime against the person or sexual offense" means any crime provided for in Chapter 5 or 6 of Title 16.

(3) "Custodial authority" means the commissioner of corrections if the offender is in the physical custody of the state, or the sheriff if the offender is incarcerated in a county jail, or the warden if the offender is incarcerated in a county correctional institution.

(4) "Offender" means a person sentenced to a term of incarceration in a state or county correctional institution.

(b) If the identity of a victim of a crime has been verified by the prosecuting attorney, who has, at the request of such victim, mailed a letter to the custodial authority requesting that the victim be notified of a change in the custodial status of an offender, then the custodial authority shall make a good faith effort to notify the victim that the offender is to be released from imprisonment, including release on extended furlough; transferred to work release; released by mandatory release upon expiration of sentence; or has escaped from confinement; or if the offender has died. The good faith effort to notify the victim must occur prior to the release or transfer noted in this subsection. For a victim of a felony crime against the person or sexual offense for which the offender was sentenced to a term of imprisonment of more than 18 months, the good faith effort to notify the victim must occur no later than ten days before the offender's release from imprisonment, transfer to or release from work release, or as soon thereafter as is practical in situations involving emergencies.

(c) The notice given to a victim of a crime against a person or sexual offense must include the conditions governing the offender's release or transfer and either the identity of the corrections agent or the county officer who will be supervising the offender's release or a means to identify the agency that will be supervising the offender's release. The custodial authority complies with this Code section upon mailing the notice of impending release to the victim at the address which the victim has most recently provided to the custodial authority in writing.

(d) If an offender escapes from imprisonment or incarceration, including from release on extended furlough or work release, the custodial authority shall make all reasonable efforts to notify a victim who has requested notice of the offender's release under subsection (b) of this Code section within six hours after discovering the escape, or as soon thereafter as is practical, and shall also make reasonable efforts to notify the victim within 24 hours after the offender is apprehended or as soon thereafter as is practical. In emergencies, telephone notification for the victim will be attempted and the results documented in the offender's central file.

(e) All identifying information regarding the victim, including the victim's request and the notice provided by the custodial authority, shall be confidential and accessible only to the victim. It is the responsibility of the victim to provide the custodial authority with a current address.

(f) A designated official in the Department of Corrections, the county correctional facility, and the sheriff's office shall coordinate the receipt of all victim correspondence and shall monitor staff responses to requests for such notification from victims of crime.

(g) The custodial authority shall not be liable for a failure to notify the victim. (Code 1981, § 42-1-11, enacted by Ga. L. 1993, p. 1278, § 1; Ga. L. 1995, p. 385, § 3; Ga. L. 2014, p. 426, § 11/HB 770.)

The 2014 amendment, effective July 1, 2014, in the middle of paragraph (a)(1), inserted “, Article 1A,” and inserted “, home invasion.”

Editor's notes. — Ga. L. 1993, p. 1278, § 2, not codified by the General Assembly, provided that this Code section shall become effective six months after the effective date of an appropriations Act containing a specific appropriation to fund the provisions of this Act. Partial funding was

provided by the General Assembly at the 1995 session. Additional funding was approved by the General Assembly at the 1997 session. Additional funding was appropriated by the General Assembly at the 1997 session.

Law reviews. — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 176 (1993). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 158 (1995).

42-1-11.1. Alien prisoners eligible for deportation; cooperation with federal deportation program; waiver of extradition rights; transportation.

(a) As used in this Code section, the term:

(1) "Alien prisoner" means a person who is not a citizen or national of the United States who is serving a sentence under the supervision of the department.

(2) "Board" means the State Board of Pardons and Paroles.

(3) "Department" means the Department of Corrections.

(4) "Release on a reprieve" means being released on a reprieve with a detainer to United States Immigration and Customs Enforcement.

(b) The department and board shall establish a process and agreements among multiple state, local, and federal agencies for the implementation of the United States Immigration and Customs Enforcement Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) Program or similar federal program, by whatever name, for the purpose of deporting alien prisoners in the state prison system who are eligible for deportation.

(c) The department shall include as a part of the intake process a procedure to identify alien prisoners eligible for deportation. The department shall coordinate with the federal authorities to determine an alien prisoner's immigration status and eligibility for removal. The identity and information regarding alien prisoners eligible for deportation shall be provided expeditiously to the board, and the board shall then consider such alien prisoner for a release on a reprieve. Alien prisoners who would otherwise be ineligible for parole shall not become eligible by reason of eligibility for a release on a reprieve.

(d) Upon an alien prisoner's acceptance into the federal deportation program, the board may establish a tentative release month for the alien prisoner to be transferred into federal custody.

(e) No tentative parole release month based on a release on a reprieve shall be set until the alien prisoner is otherwise eligible for parole. No tentative parole release month shall be set for any date prior to the effective date of a final deportation removal order.

(f) The board shall provide notice and obtain acknowledgment in writing that notice was given to each alien prisoner who is eligible for a release on a reprieve that illegal reentry into the United States shall subject such alien prisoner to being returned to the custody of the department to complete the remainder of his or her court-imposed sentence. Prior to granting a release on a reprieve, the alien prisoner

shall make a knowing, voluntary, and intelligent waiver in writing of all rights of extradition which would challenge the alien prisoner's parole revocation and return the alien prisoner to the department to complete the remainder of his or her sentence in the event such alien prisoner violates a condition of the release on a reprieve.

(g) An alien prisoner shall not be eligible for a release on a reprieve if the federal authorities determine that the alien prisoner's removal is not reasonably foreseeable.

(h) The department shall maintain exclusive control and responsibility for the custody and transportation of alien prisoners to and from federal facilities. (Code 1981, § 42-1-11.1, enacted by Ga. L. 2010, p. 263, § 2/SB 136.)

Editor's notes. — Ga. L. 2010, p. 263, § 1, not codified by the General Assembly, provides: "It is the intent of the General Assembly to ensure that alien prisoners subject to deportation are not released from prison into the Georgia community. It is further the intent of this legislative body to reduce the costs and expenses of operating state prisons by reducing the number of alien prisoners incarcerated in the Georgia penal system and to expedite the deportation process of such prisoners. Moreover, Georgia should support the re-arrest and revocation of parole of any

alien prisoner who reenters the United States in violation of a release on a reprieve with a detainer to United States Immigration and Customs Enforcement. The General Assembly intends to require state agencies to take part in the Immigration and Customs Enforcement Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) Program funded and operated by the United States government and take all measures to fully cooperate and communicate with state, local, and federal agencies for the implementation of such program."

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 4-8-27 are offenses for which those

charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

42-1-11.2. Advice on employment of attorney prohibited; penalty.

(a) No employee of a penal institution shall give advice to an inmate regarding the name or the employment of an attorney at law in any case where the inmate is confined in a penal institution or receive any sum of money paid as fees or otherwise to attorneys at law in a criminal case or cases against any inmate with which they may be connected in any capacity.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-1-11.2, enacted by Ga. L. 2012, p. 899, § 7-2/HB 1176.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the

statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

ARTICLE 2

SEXUAL OFFENDER REGISTRATION REVIEW BOARD

Editor's notes. — Ga. L. 2006, p. 379, § 24/HB 1059, designated existing Code Sections 42-1-12 and 42-1-13 and new Code Sections 42-1-14 and 42-1-15 as Article 2 of this chapter.

Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Law reviews. — For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

42-1-12. State Sexual Offender Registry.

(a) As used in this article, the term:

(1) "Address" means the street or route address of the sexual offender's residence. For purposes of this Code section, the term shall not mean a post office box.

(2) "Appropriate official" means:

(A) With respect to a sexual offender who is sentenced to probation without any sentence of incarceration in the state prison system or who is sentenced pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, the Division of Probation of the Department of Corrections;

(B) With respect to a sexual offender who is sentenced to a period of incarceration in a prison under the jurisdiction of the Department of Corrections and who is subsequently released from prison or placed on probation, the commissioner of corrections or his or her designee;

(C) With respect to a sexual offender who is placed on parole, the chairperson of the State Board of Pardons and Paroles or his or her designee; and

(D) With respect to a sexual offender who is placed on probation through a private probation agency, the director of the private probation agency or his or her designee.

(3) "Area where minors congregate" shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community swimming pools.

(4) "Assessment criteria" means the tests that the board members use to determine the likelihood that a sexual offender will commit another criminal offense against a victim who is a minor or commit a dangerous sexual offense.

(5) "Board" means the Sexual Offender Registration Review Board.

(6) "Child care facility" means all public and private pre-kindergarten facilities, child care learning centers, preschool facilities, and long-term care facilities for children.

(6.1) "Child care learning center" shall have the same meaning as set forth in paragraph (2) of Code Section 20-1A-2.

(7) "Church" means a place of public religious worship.

(8) "Conviction" includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime, a plea of guilty, or a plea

of nolo contendere. A defendant who is discharged without adjudication of guilt and who is not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall be subject to the registration requirements of this Code section for the period of time prior to the defendant's discharge after completion of his or her sentence or upon the defendant being adjudicated guilty. Unless otherwise required by federal law, a defendant who is discharged without adjudication of guilt and who is not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall not be subject to the registration requirements of this Code section upon the defendant's discharge.

(9)(A) "Criminal offense against a victim who is a minor" with respect to convictions occurring on or before June 30, 2001, means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

- (i) Kidnapping of a minor, except by a parent;
- (ii) False imprisonment of a minor, except by a parent;
- (iii) Criminal sexual conduct toward a minor;
- (iv) Solicitation of a minor to engage in sexual conduct;
- (v) Use of a minor in a sexual performance;
- (vi) Solicitation of a minor to practice prostitution; or
- (vii) Any conviction resulting from an underlying sexual offense against a victim who is a minor.

(B) "Criminal offense against a victim who is a minor" with respect to convictions occurring after June 30, 2001, means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

- (i) Kidnapping of a minor, except by a parent;
- (ii) False imprisonment of a minor, except by a parent;
- (iii) Criminal sexual conduct toward a minor;
- (iv) Solicitation of a minor to engage in sexual conduct;
- (v) Use of a minor in a sexual performance;
- (vi) Solicitation of a minor to practice prostitution;
- (vii) Use of a minor to engage in any sexually explicit conduct to produce any visual medium depicting such conduct;

(viii) Creating, publishing, selling, distributing, or possessing any material depicting a minor or a portion of a minor's body engaged in sexually explicit conduct;

(ix) Transmitting, making, selling, buying, or disseminating by means of a computer any descriptive or identifying information regarding a child for the purpose of offering or soliciting sexual conduct of or with a child or the visual depicting of such conduct;

(x) Conspiracy to transport, ship, receive, or distribute visual depictions of minors engaged in sexually explicit conduct; or

(xi) Any conduct which, by its nature, is a sexual offense against a victim who is a minor.

(C) For purposes of this paragraph, a conviction for a misdemeanor shall not be considered a criminal offense against a victim who is a minor, and conduct which is adjudicated in juvenile court shall not be considered a criminal offense against a victim who is a minor.

(10)(A) "Dangerous sexual offense" with respect to convictions occurring on or before June 30, 2006, means any criminal offense, or the attempt to commit any criminal offense, under Title 16 as specified in this paragraph or any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of the following offenses:

(i) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ii) Rape in violation of Code Section 16-6-1;

(iii) Aggravated sodomy in violation of Code Section 16-6-2;

(iv) Aggravated child molestation in violation of Code Section 16-6-4; or

(v) Aggravated sexual battery in violation of Code Section 16-6-22.2.

(B) "Dangerous sexual offense" with respect to convictions occurring after June 30, 2006, means any criminal offense, or the attempt to commit any criminal offense, under Title 16 as specified in this paragraph or any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of the following offenses:

(i) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ii) Kidnapping in violation of Code Section 16-5-40 which involves a victim who is less than 14 years of age, except by a parent;

(iii) False imprisonment in violation of Code Section 16-5-41 which involves a victim who is less than 14 years of age, except by a parent;

(iv) Rape in violation of Code Section 16-6-1;

(v) Sodomy in violation of Code Section 16-6-2;

(vi) Aggravated sodomy in violation of Code Section 16-6-2;

(vii) Statutory rape in violation of Code Section 16-6-3, if the individual convicted of the offense is 21 years of age or older;

(viii) Child molestation in violation of Code Section 16-6-4;

(ix) Aggravated child molestation in violation of Code Section 16-6-4, unless the person was convicted of a misdemeanor offense;

(x) Enticing a child for indecent purposes in violation of Code Section 16-6-5;

(xi) Sexual assault against persons in custody in violation of Code Section 16-6-5.1;

(xii) Incest in violation of Code Section 16-6-22;

(xiii) A second conviction for sexual battery in violation of Code Section 16-6-22.1;

(xiv) Aggravated sexual battery in violation of Code Section 16-6-22.2;

(xv) Sexual exploitation of children in violation of Code Section 16-12-100;

(xvi) Electronically furnishing obscene material to minors in violation of Code Section 16-12-100.1;

(xvii) Computer pornography and child exploitation prevention in violation of Code Section 16-12-100.2;

(xviii) Obscene telephone contact in violation of Code Section 16-12-100.3; or

(xix) Any conduct which, by its nature, is a sexual offense against a victim who is a minor or an attempt to commit a sexual offense against a victim who is a minor.

(C) For purposes of this paragraph, a conviction for a misdemeanor shall not be considered a dangerous sexual offense, and

conduct which is adjudicated in juvenile court shall not be considered a dangerous sexual offense.

(11) "Institution of higher education" means a private or public community college, state university, state college, or independent postsecondary institution.

(12) "Level I risk assessment classification" means the sexual offender is a low sex offense risk and low recidivism risk for future sexual offenses.

(13) "Level II risk assessment classification" means the sexual offender is an intermediate sex offense risk and intermediate recidivism risk for future sexual offenses and includes all sexual offenders who do not meet the criteria for classification either as a sexually dangerous predator or for Level I risk assessment.

(14) "Minor" means any individual under the age of 18 years and any individual that the sexual offender believed at the time of the offense was under the age of 18 years if such individual was the victim of an offense.

(15) "Public and community swimming pools" includes municipal, school, hotel, motel, or any pool to which access is granted in exchange for payment of a daily fee. The term includes apartment complex pools, country club pools, or subdivision pools which are open only to residents of the subdivision and their guests. This term does not include a private pool or hot tub serving a single-family dwelling and used only by the residents of the dwelling and their guests.

(16) "Required registration information" means:

(A) Name; social security number; age; race; sex; date of birth; height; weight; hair color; eye color; fingerprints; and photograph;

(B) Address, within this state or out of state, and, if applicable in addition to the address, a rural route address and a post office box;

(C) If the place of residence is a motor vehicle or trailer, the vehicle identification number, the license tag number, and a description, including color scheme, of the motor vehicle or trailer;

(D) If the place of residence is a mobile home, the mobile home location permit number; the name and address of the owner of the home; a description, including the color scheme of the mobile home; and, if applicable, a description of where the mobile home is located on the property;

(E) If the place of residence is a manufactured home, the name and address of the owner of the home; a description, including the color scheme of the manufactured home; and, if applicable, a

description of where the manufactured home is located on the property;

(F) If the place of residence is a vessel, live-aboard vessel, or houseboat, the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat;

(F.1) If the place of residence is the status of homelessness, information as provided under paragraph (2.1) of subsection (f) of this Code section;

(G) Date of employment, place of any employment, and address of employer;

(H) Place of vocation and address of the place of vocation;

(I) Vehicle make, model, color, and license tag number;

(J) If enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the name, address, and county of each institution, including each campus attended, and enrollment or employment status; and

(K) The name of the crime or crimes for which the sexual offender is registering and the date released from prison or placed on probation, parole, or supervised release.

(17) "Risk assessment classification" means the notification level into which a sexual offender is placed based on the board's assessment.

(18) "School" means all public and private kindergarten, elementary, and secondary schools.

(19) "School bus stop" means a school bus stop as designated by local school boards of education or by a private school.

(20) "Sexual offender" means any individual:

(A) Who has been convicted of a criminal offense against a victim who is a minor or any dangerous sexual offense;

(B) Who has been convicted under the laws of another state or territory, under the laws of the United States, under the Uniform Code of Military Justice, or in a tribal court of a criminal offense against a victim who is a minor or a dangerous sexual offense; or

(C) Who is required to register pursuant to subsection (e) of this Code section.

(21) "Sexually dangerous predator" means a sexual offender:

(A) Who was designated as a sexually violent predator between July 1, 1996, and June 30, 2006; or

(B) Who is determined by the Sexual Offender Registration Review Board to be at risk of perpetrating any future dangerous sexual offense.

(22) "Vocation" means any full-time, part-time, or volunteer employment with or without compensation exceeding 14 consecutive days or for an aggregate period of time exceeding 30 days during any calendar year.

(b) Before a sexual offender who is required to register under this Code section is released from prison or placed on parole, supervised release, or probation, the appropriate official shall:

(1) Inform the sexual offender of the obligation to register, the amount of the registration fee, and how to maintain registration;

(2) Obtain the information necessary for the required registration information;

(3) Inform the sexual offender that, if the sexual offender changes any of the required registration information, other than residence address, the sexual offender shall give the new information to the sheriff of the county with whom the sexual offender is registered within 72 hours of the change of information; if the information is the sexual offender's new residence address, the sexual offender shall give the information to the sheriff of the county with whom the sexual offender last registered within 72 hours prior to moving and to the sheriff of the county to which the sexual offender is moving within 72 hours prior to moving;

(4) Inform the sexual offender that he or she shall also register in any state where he or she is employed, carries on a vocation, or is a student;

(5) Inform the sexual offender that, if he or she changes residence to another state, the sexual offender shall register the new address with the sheriff of the county with whom the sexual offender last registered and that the sexual offender shall also register with a designated law enforcement agency in the new state within 72 hours after establishing residence in the new state;

(6) Obtain fingerprints and a current photograph of the sexual offender;

(7) Require the sexual offender to read and sign a form stating that the obligations of the sexual offender have been explained;

(8) Obtain and forward any information obtained from the clerk of court pursuant to Code Section 42-5-50 to the sheriff's office of the county in which the sexual offender will reside; and

(9) If required by Code Section 42-1-14, place any required electronic monitoring system on the sexually dangerous predator and explain its operation and cost.

(c) The Department of Corrections shall:

(1) Forward to the Georgia Bureau of Investigation a copy of the form stating that the obligations of the sexual offender have been explained;

(2) Forward any required registration information to the Georgia Bureau of Investigation;

(3) Forward the sexual offender's fingerprints and photograph to the sheriff's office of the county where the sexual offender is going to reside;

(4) Inform the board and the prosecuting attorney for the jurisdiction in which a sexual offender was convicted of the impending release of a sexual offender at least eight months prior to such release so as to facilitate compliance with Code Section 42-1-14; and

(5) Keep all records of sexual offenders in a secure facility in accordance with Code Sections 15-1-10, 15-6-62, and 15-6-62.1 until official proof of death of a registered sexual offender; thereafter, the records shall be destroyed.

(d) No sexual offender shall be released from prison or placed on parole, supervised release, or probation until:

(1) The appropriate official has provided the Georgia Bureau of Investigation and the sheriff's office in the county where the sexual offender will be residing with the sexual offender's required registration information and risk assessment classification level; and

(2) The sexual offender's name has been added to the list of sexual offenders maintained by the Georgia Bureau of Investigation and the sheriff's office as required by this Code section.

(e) Registration pursuant to this Code section shall be required by any individual who:

(1) Is convicted on or after July 1, 1996, of a criminal offense against a victim who is a minor;

(2) Is convicted on or after July 1, 1996, of a dangerous sexual offense;

(3) Has previously been convicted of a criminal offense against a victim who is a minor and may be released from prison or placed on parole, supervised release, or probation on or after July 1, 1996;

(4) Has previously been convicted of a sexually violent offense or dangerous sexual offense and may be released from prison or placed on parole, supervised release, or probation on or after July 1, 1996;

(5) Is a resident of Georgia who intends to reside in this state and who is convicted under the laws of another state or the United States, under the Uniform Code of Military Justice, or in a tribal court of a sexually violent offense, a criminal offense against a victim who is a minor on or after July 1, 1999, or a dangerous sexual offense on or after July 1, 1996;

(6) Is a nonresident who changes residence from another state or territory of the United States or any other place to Georgia who is required to register as a sexual offender under federal law, military law, tribal law, or the laws of another state or territory or who has been convicted in this state of a criminal offense against a victim who is a minor or any dangerous sexual offense;

(7) Is a nonresident sexual offender who enters this state for the purpose of employment or any other reason for a period exceeding 14 consecutive days or for an aggregate period of time exceeding 30 days during any calendar year regardless of whether such sexual offender is required to register under federal law, military law, tribal law, or the laws of another state or territory; or

(8) Is a nonresident sexual offender who enters this state for the purpose of attending school as a full-time or part-time student regardless of whether such sexual offender is required to register under federal law, military law, tribal law, or the laws of another state or territory.

(f) Any sexual offender required to register under this Code section shall:

(1) Provide the required registration information to the appropriate official before being released from prison or placed on parole, supervised release, or probation;

(2) Register in person with the sheriff of the county in which the sexual offender resides within 72 hours after the sexual offender's release from prison or placement on parole, supervised release, probation, or entry into this state;

(2.1) In the case of a sexual offender whose place of residence is the status of homelessness, in lieu of the requirements of paragraph (2) of this subsection, register in person with the sheriff of the county in which the sexual offender sleeps within 72 hours after the sexual offender's release from prison or placement on parole, supervised release, probation, or entry into this state and provide the location where he or she sleeps;

(3) Maintain the required registration information with the sheriff of each county in which the sexual offender resides or sleeps;

(4) Renew the required registration information with the sheriff of the county in which the sexual offender resides or sleeps by reporting in person to the sheriff within 72 hours prior to such offender's birthday each year to be photographed and fingerprinted;

(5) Update the required registration information with the sheriff of the county in which the sexual offender resides within 72 hours of any change to the required registration information, other than where he or she resides or sleeps if such person is homeless. If the information is the sexual offender's new address, the sexual offender shall give the information regarding the sexual offender's new address to the sheriff of the county in which the sexual offender last registered within 72 hours prior to any change of address and to the sheriff of the county to which the sexual offender is moving within 72 hours prior to establishing such new address. If the sexual offender is homeless and the information is the sexual offender's new sleeping location, within 72 hours of changing sleeping locations, the sexual offender shall give the information regarding the sexual offender's new sleeping location to the sheriff of the county in which the sexual offender last registered, and if the county has changed, to the sheriff of the county to which the sexual offender has moved; and

(6) Continue to comply with the registration requirements of this Code section for the entire life of the sexual offender, excluding ensuing periods of incarceration.

(g) A sexual offender required to register under this Code section may petition to be released from the registration requirements and from the residency or employment restrictions of this Code section in accordance with the provisions of Code Section 42-1-19.

(h)(1) The appropriate official or sheriff shall, within 72 hours after receipt of the required registration information, forward such information to the Georgia Bureau of Investigation. Once the data is entered into the Criminal Justice Information System by the appropriate official or sheriff, the Georgia Crime Information Center shall notify the sheriff of the sexual offender's county of residence, either permanent or temporary, the sheriff of the county of employment, and the sheriff of the county where the sexual offender attends an institution of higher education within 24 hours of entering the data or any change to the data.

(2) The Georgia Bureau of Investigation shall:

(A) Transmit all information, including the conviction data and fingerprints, to the Federal Bureau of Investigation within 24 hours of entering the data;

(B) Establish operating policies and procedures concerning record ownership, quality, verification, modification, and cancellation; and

(C) Perform mail out and verification duties as follows:

(i) Send each month Criminal Justice Information System network messages to sheriffs listing sexual offenders due for verification;

(ii) Create a photo image file from original entries and provide such entries to sheriffs to assist in sexual offender identification and verification;

(iii) Mail a nonforwardable verification form to the last reported address of the sexual offender within ten days prior to the sexual offender's birthday;

(iv) If the sexual offender changes residence to another state, notify the law enforcement agency with which the sexual offender shall register in the new state; and

(v) Maintain records required under this Code section.

(i) The sheriff's office in each county shall:

(1) Prepare and maintain a list of all sexual offenders and sexually dangerous predators residing in each county. Such list shall include the sexual offender's name; age; physical description; address; crime of conviction, including conviction date and the jurisdiction of the conviction; photograph; and the risk assessment classification level provided by the board, and an explanation of how the board classifies sexual offenders and sexually dangerous predators;

(2) Electronically submit and update all information provided by the sexual offender within two business days to the Georgia Bureau of Investigation in a manner prescribed by the Georgia Bureau of Investigation;

(3) Maintain and provide a list, manually or electronically, of every sexual offender residing in each county so that it may be available for inspection:

(A) In the sheriff's office;

(B) In any county administrative building;

(C) In the main administrative building for any municipal corporation;

(D) In the office of the clerk of the superior court so that such list is available to the public; and

(E) On a website maintained by the sheriff of the county for the posting of general information;

(4) Update the public notices required by paragraph (3) of this subsection within two business days of the receipt of such information;

(5) Inform the public of the presence of sexual offenders in each community;

(6) Update the list of sexual offenders residing in the county upon receipt of new information affecting the residence address of a sexual offender or upon the registration of a sexual offender moving into the county by virtue of release from prison, relocation from another county, conviction in another state, federal court, military tribunal, or tribal court. Such list, and any additions to such list, shall be delivered, within 72 hours of updating the list of sexual offenders residing in the county, to all schools or institutions of higher education located in the county;

(7) Within 72 hours of the receipt of changed required registration information, notify the Georgia Bureau of Investigation through the Criminal Justice Information System of each change of information;

(8) Retain the verification form stating that the sexual offender still resides at the address last reported;

(9) Enforce the criminal provisions of this Code section. The sheriff may request the assistance of the Georgia Bureau of Investigation to enforce the provisions of this Code section;

(10) Cooperate and communicate with other sheriffs' offices in this state and in the United States to maintain current data on the location of sexual offenders;

(11) Determine the appropriate time of day for reporting by sexual offenders, which shall be consistent with the reporting requirements of this Code section;

(12) If required by Code Section 42-1-14, place any electronic monitoring system on the sexually dangerous predator and explain its operation and cost;

(13) Provide current information on names and addresses of all registered sexual offenders to campus police with jurisdiction for the campus of an institution of higher education if the campus is within the sheriff's jurisdiction; and

(14) Collect the annual \$250.00 registration fee from the sexual offender and transmit such fees to the state for deposit into the general fund.

(j)(1) The sheriff of the county where the sexual offender resides or last registered shall be the primary law enforcement official charged with communicating the whereabouts of the sexual offender and any changes in required registration information to the sheriff's office of the county or counties where the sexual offender is employed, volunteers, attends an institution of higher education, or moves.

(2) The sheriff's office may post the list of sexual offenders in any public building in addition to those locations enumerated in subsection (h) of this Code section.

(k) The Georgia Crime Information Center shall create the Criminal Justice Information System network transaction screens by which appropriate officials shall enter original data required by this Code section. Screens shall also be created for sheriffs' offices for the entry of record confirmation data; employment; changes of residence, institutions of higher education, or employment; or other pertinent data to assist in sexual offender identification.

(l)(1) On at least an annual basis, the Department of Education shall obtain from the Georgia Bureau of Investigation a complete list of the names and addresses of all registered sexual offenders and shall provide access to such information, accompanied by a hold harmless provision, to each school in this state. In addition, the Department of Education shall provide information to each school in this state on accessing and retrieving from the Georgia Bureau of Investigation's website a list of the names and addresses of all registered sexual offenders.

(2) On at least an annual basis, the Department of Early Care and Learning shall provide current information to all child care programs regulated pursuant to Code Section 20-1A-10 and to all child care learning centers, day-care, group day-care, and family day-care programs regulated pursuant to Code Section 49-5-12 on accessing and retrieving from the Georgia Bureau of Investigation's website a list of the names and addresses of all registered sexual offenders and shall include, on a continuing basis, such information with each application for licensure, commissioning, or registration for early care and education programs.

(3) On at least an annual basis, the Department of Human Services shall provide current information to all long-term care facilities for children on accessing and retrieving from the Georgia Bureau of Investigation's website a list of the names and addresses of all registered sexual offenders.

(m) Within ten days of the filing of a defendant's discharge and exoneration of guilt pursuant to Article 3 of Chapter 8 of this title, the clerk of court shall transmit the order of discharge and exoneration to

the Georgia Bureau of Investigation and any sheriff maintaining records required under this Code section.

(n) Any individual who:

(1) Is required to register under this Code section and who fails to comply with the requirements of this Code section;

(2) Provides false information; or

(3) Fails to respond directly to the sheriff of the county where he or she resides or sleeps within 72 hours prior to such individual's birthday

shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than 30 years; provided, however, that upon the conviction of the second offense under this subsection, the defendant shall be punished by imprisonment for not less than five nor more than 30 years.

(o) The information collected pursuant to this Code section shall be treated as private data except that:

(1) Such information may be disclosed to law enforcement agencies for law enforcement purposes;

(2) Such information may be disclosed to government agencies conducting confidential background checks; and

(3) The Georgia Bureau of Investigation or any sheriff maintaining records required under this Code section shall, in addition to the requirements of this Code section to inform the public of the presence of sexual offenders in each community, release such other relevant information collected under this Code section that is necessary to protect the public concerning sexual offenders required to register under this Code section, except that the identity of a victim of an offense that requires registration under this Code section shall not be released.

(p) The Board of Public Safety is authorized to promulgate rules and regulations necessary for the Georgia Bureau of Investigation and the Georgia Crime Information Center to implement and carry out the provisions of this Code section.

(q) Law enforcement agencies, employees of law enforcement agencies, and state officials shall be immune from liability for good faith conduct under this article. (Code 1981, § 42-1-12, enacted by Ga. L. 1996, p. 1520, § 1; Ga. L. 1997, p. 143, § 42; Ga. L. 1997, p. 380, § 1; Ga. L. 1998, p. 831, § 1; Ga. L. 1999, p. 81, § 42; Ga. L. 1999, p. 837, § 1; Ga. L. 2001, p. 1004, § 1; Ga. L. 2002, p. 571, § 1; Ga. L. 2002, p. 1400, §§ 1, 2; Ga. L. 2003, p. 140, § 42; Ga. L. 2003, p. 281, § 1; Ga. L.

2004, p. 645, § 5; Ga. L. 2004, p. 1064, §§ 1, 2; Ga. L. 2005, p. 453, § 1/HB 106; Ga. L. 2006, p. 72, § 42/SB 465; Ga. L. 2006, p. 379, § 24/HB 1059; Ga. L. 2008, p. 680, §§ 2, 3/SB 1; Ga. L. 2008, p. 810, §§ 3, 4/SB 474; Ga. L. 2009, p. 8, § 42/SB 46; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 167, § 1/HB 651; Ga. L. 2010, p. 168, §§ 5, 6, 7, 8, 9, 10, 11/HB 571; Ga. L. 2011, p. 752, § 42/HB 142; Ga. L. 2012, p. 173, § 2-9/HB 665; Ga. L. 2013, p. 135, § 10/HB 354.)

The 2012 amendment, effective July 1, 2012, in paragraph (c)(5), inserted “in accordance with Code Sections 15-1-10, 15-6-62, and 15-6-62.1” and deleted “in accordance with Code Sections 15-1-10, 15-6-62, and 15-6-62.1” following “destroyed” at the end.

The 2013 amendment, effective July 1, 2013, deleted “day-care centers,” following “pre-kindergarten facilities,” in paragraph (a)(6); redesignated former paragraph (a)(10.1) as present paragraph (a)(6.1); and, in paragraph (a)(6.1), substituted “Child care learning center” for “Day-care center” at the beginning, and substituted “paragraph (2)” for “paragraph (4)” near the end.

Cross references. — Development of model program for educating students regarding online safety, § 20-2-149. Residing near and photographing minors by registered sexual offenders, § 42-1-15.

Code Commission notes. — The amendment of this Code section by Ga. L. 2002, p. 571, § 1, irreconcilably conflicted with and was treated as superseded by Ga. L. 2002, p. 1400, § 2. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

The amendment of this Code section by Ga. L. 2006, p. 72, § 42/SB 465, irreconcilably conflicted with and was treated as superseded by Ga. L. 2006, p. 379, § 24/HB 1059. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Editor’s notes. — Ga. L. 2004, p. 1064, § 2, not codified by the General Assembly, provides that the amendment by that act shall apply to sentences imposed on or after July 1, 2004.

Ga. L. 2006, p. 379, § 24/HB 1059, effective July 1, 2006, repealed the former Code section and enacted the current Code section covering substantially the same subject matter. The former Code section was based on Code 1981, § 42-1-12, enacted by Ga. L. 1996, p.

1520, § 1; Ga. L. 1997, p. 143, § 42; Ga. L. 1997, p. 380, § 1; Ga. L. 1998, p. 831, § 1; Ga. L. 1999, p. 81, § 42; Ga. L. 1999, p. 837, § 1; Ga. L. 2001, p. 1004, § 1; Ga. L. 2002, p. 571, § 1; Ga. L. 2002, p. 1400, §§ 1, 2; Ga. L. 2003, p. 140, § 42; Ga. L. 2003, p. 281, § 1; Ga. L. 2004, p. 645, § 5; Ga. L. 2004, p. 1064, §§ 1, 2; Ga. L. 2005, p. 453, § 1/HB 106.

Ga. L. 2006, p. 379, § 30/HB 1059, not codified by the General Assembly, provides, in part, that: “(b) Any person required to register pursuant to the provisions of Code Section 42-1-12, relating to the state sexual offender registry, and any person required not to reside within areas where minors congregate, as prohibited by Code Section 42-1-13, shall not be relieved of the obligation to comply with the provisions of said Code sections by the repeal and reenactment of said Code sections.

“(c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Administrative rules and regulations. — The Georgia Sexually Violent Offender Registry, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Crime Information Center Council, Practice and Procedure, Chapter 140-2.

Law reviews. — For annual survey article discussing developments in criminal law, see 52 *Mercer L. Rev.* 167 (2000). For article on 2006 amendment of this Code section, see 23 *Ga. St. U.L. Rev.* 11 (2006). For survey article on criminal law, see 60 *Mercer L. Rev.* 85 (2008). For article, “‘Sexting’ to Minors in a Rapidly Evolving Digital Age: *Frix v. State* Establishes the Applicability of Georgia’s Ob-

scenity Statutes to Text Messages,” see 61 Mercer L. Rev. 1283 (2010).

For review of 1996 department of corrections legislation, see 13 Ga. U. L. Rev. 257 (1996). For note, “A Mandate Without a Duty: The Apparent Scope of Georgia’s

Megan’s Law,” see 15 Ga. St. U.L. Rev. 1131 (1999). For note on the 2001 amendment to this Code section, see 18 Ga. St. U.L. Rev. 227 (2001). For note on the 2003 amendment to this section, see 20 Ga. St. U.L. Rev. 217 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EVIDENCE AND PROCEDURAL ISSUES

REGISTRATION REQUIRED

REGISTRATION NOT REQUIRED

General Consideration

Constitutionality. — Defendant who entered an Alford plea in 2000 to sex offenses as a first offender was properly required to register as a sex offender pursuant to the 2005 amendment to O.C.G.A. § 42-1-12; the statute applies to first offenders convicted before July 1, 2004, and it is not an ex post facto law because if a defendant fails to register, the defendant will be guilty of a felony distinct from those crimes of which the defendant has been previously convicted. *Watson v. State*, 283 Ga. App. 635, 642 S.E.2d 328 (2007).

Defendant’s conviction for violating O.C.G.A. § 42-1-12(e)(3) as a result of failing to renew the defendant’s registration as a sex offender was upheld on appeal as the requirement to register as a sexual offender under § 42-1-12(e)(3) resulted in a new crime under § 42-1-12(n) and was not an ex post facto law. *Frazier v. State*, 284 Ga. 638, 668 S.E.2d 646 (2008).

Trial court did not err in revoking a convicted sexual offender’s probation for failing to register an address change when the offender moved into a motel because O.C.G.A. § 42-1-12 was not unconstitutionally vague in failing to define the term “temporary residence”; nor does the statute’s use of the term “temporary residence” in any way authorize or encourage arbitrary and discriminatory enforcement, but rather, § 42-1-12(a)(16) sets forth in considerable detail the information that must be reported by a sexual offender. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Trial court did not err in revoking a convicted sexual offender’s probation for failing to register an address change after the offender moved into a motel because the offender failed to establish that the offender was treated differently from a similarly situated nonresident sexual offender entering the state; if O.C.G.A. § 42-1-12(e)(7) applies to a hypothetical nonresident sexual offender, that person must update his or her information within 72 hours of a change of address as required in § 42-1-12(f)(5), and any nonresident sexual offender who is required to register by virtue of the specification of § 42-1-12(e)(7) is equally subject to the requirement that he or she register a new address within 72 hours of changing that address and equally subject to being charged with a violation. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Because sexual offender registry requirements are regulatory, and not punitive the registry requirement is not a cruel and unusual punishment in violation of the Eighth Amendment; moreover, it is of no consequence whether a defendant has committed an offense that is “sexual” in nature before being required to register since the nature of the offense requiring the registration would not somehow change the registration requirements into a form of “punishment.” *Rainer v. State*, 286 Ga. 675, 690 S.E.2d 827 (2010).

O.C.G.A. § 42-1-12 does not violate substantive due process because § 42-1-12 advances the state’s legitimate goal of informing the public for purposes of protecting children from those who would harm the children, and it is not arbitrary

to believe that a child may be more at risk of harm from someone who would falsely imprison the child and who is not the child's parent; the fact that a defendant's offense did not involve sexual activity is of no consequence because under the statute, one only needs to have committed a criminal offense against a victim who is a minor in order to meet the statutory definition of "sexual offender" for purposes of registration. *Rainer v. State*, 286 Ga. 675, 690 S.E.2d 827 (2010).

It is commonly understood by persons of common intelligence that criminal conduct which is a sexual offense is, at a minimum, criminal conduct which involves genitalia. Inasmuch as the offense of cruelty to children is found in Title 16 of the Official Code of Georgia Annotated and a defendant's conduct that led to the defendant's conviction is a sexual offense, O.C.G.A. § 42-1-12 is not unconstitutionally vague. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

Registration requirements for homeless sex offenders unconstitutional vague. — Defendant was entitled to quash an indictment charging the defendant with failure to register a new residence address under O.C.G.A. § 42-1-12 as the defendant, who was homeless and not living in a shelter, was not given an objective standard or guidelines as to how to register if the defendant did not have a street or route address; thus, § 42-1-12 was unconstitutionally vague as applied to homeless sex offenders without a street or route address. *Santos v. State*, 284 Ga. 514, 668 S.E.2d 676 (2008).

Reliance on registration database. — Defendant sergeant reasonably relied on the Georgia Bureau of Investigation's information that charges for failing to register as a sex offender were outstanding and that the plaintiff was last known to be in the sergeant's county; thus, verifying that the offender had not given the offender's address to the sheriff provided sufficient probable cause to seek an arrest warrant and a Fourth Amendment challenge properly failed; O.C.G.A. § 42-1-12(c) statutorily charged the Geor-

gia Bureau of Investigation (GBI) with providing conviction data (including names and fingerprints) of persons required to register as sex offenders to local sheriffs, who in turn were charged with maintaining a list of their names and addresses, and the sergeant was in no position to challenge the information on the GBI database. *Smith v. Greenlee*, 289 Fed. Appx. 373 (11th Cir. 2008) (Unpublished).

As for defendant's argument that registering as a sex offender would have exposed the defendant to prosecution for reentry of a previously removed alien under 8 U.S.C. § 1326, the court found no Fifth Amendment violation because the defendant could not show that anything the defendant would have been required to provide under Georgia's sex offender statute would have confronted the defendant with a substantial hazard of self-incrimination (there were no nationality, visa, or other immigration details required to be submitted); the cases defendant cited in support of the defendant's Fifth Amendment argument were distinguishable because those cases imposed a disclosure requirement largely designed to discover involvement in criminal activities, and the Sex Offender Registration Notification Act, 18 U.S.C. § 2250(a), was not designed to uncover criminal behavior, but was instead intended to protect the public from sex offenders by tracking the offenders' interstate movement. *United States v. Simon-Marcos*, No. 09-11189, 2010 U.S. App. LEXIS 2319 (11th Cir. Feb. 2, 2010) (Unpublished).

Construction. — Nothing in O.C.G.A. § 42-1-12 makes the registration requirements conditional upon a sexual offender having been told of the need to register upon release. Instead, § 42-1-12 directs the official to give the registration information to a person who is required to register, which indicates that the sexual offender has an obligation to register which is independent of the notice given by the official. *Petway v. State*, 291 Ga. App. 301, 661 S.E.2d 667 (2008).

O.C.G.A. § 42-1-12(e)(7) clearly provides that convictions for rape and crimes relating to rape require registration as a sex offender, and the statute is not uncon-

General Consideration (Cont'd)

stitutionally vague. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

O.C.G.A. § 42-1-12(e)(7) does not give a nonresident sexual offender who falls under its definition license to remain in the state for fourteen consecutive days without providing notification to the appropriate sheriff because the statute brings such a person within the ambit of § 42-1-12; the obligations of those who are required to register are unaffected by the specifications in § 42-1-12(e)(7) because § 42-1-12(e) declares who shall register, and § 42-1-12(f) prescribes the obligations of those persons. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Trial court properly convicted the defendant of failing to register as a sexual offender under O.C.G.A. § 42-1-12(e)(4) because the statute was not unconstitutionally vague absent the definition of the term sexually violent offense as the statute included offenses in violation of O.C.G.A. § 16-6-22.2 and the defendant admitted the defendant knew the defendant was required to register. *Youmans v. State*, 291 Ga. 754, 732 S.E.2d 441 (2012).

Counseling requirement as precondition to parole. — Prisoner who has not been convicted of a sex offense is entitled to due process before the state declares the prisoner to be a sex offender. While classification or designation as a sex offender under Georgia law is controlled by Georgia's Sex Offender Registration law, O.C.G.A. § 42-1-12, the Parole Board's counseling precondition was insufficiently stigmatizing to constitute a deprivation of a constitutionally protected liberty interest and to support a due process entitlement. *Kramer v. Donald*, 286 Fed. Appx. 674 (11th Cir. 2008) (Unpublished).

Cruel and unusual punishment. — Habeas court properly ruled that an inmate's sentence of 10 years in prison for having consensual oral sex with a 15-year-old when the inmate was only 17 years old constituted cruel and unusual punishment in light of the 2006 amendments to O.C.G.A. §§ 16-6-4 and 42-1-12. As a result, the inmate's conviction was reversed and the inmate was not required to register as a sex offender. *Humphrey v.*

Wilson, 282 Ga. 520, 652 S.E.2d 501 (2007).

Trial court did not err in denying the defendant's motion to strike an illegal sentence because the requirement that the defendant register as a sex offender did not violate the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

Failure to register results in new crime. — Defendant's failure to abide by the requirement to register as a sexual offender, pursuant to O.C.G.A. § 42-1-12, would result in a new crime, thus, § 42-1-12 is not an ex post facto law. *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008).

Registration requirement not sentence or punishment. — Requiring a defendant who had been convicted of aggravated child molestation to submit to lifetime registration as a sex offender under O.C.G.A. § 42-1-12 did not exceed the maximum sentence allowed under O.C.G.A. § 16-6-4 as such registration was not a sentence or a punishment. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642 (2010).

Registration is not a sentence or punishment. — That the sentencing judge did not impose sexual offender registration as a condition of probation did not excuse the defendant from registering as registration was not a sentence or a punishment. *Rogers v. State*, 297 Ga. App. 655, 678 S.E.2d 125 (2009).

Requiring registration as special condition of probation proper. — Trial court did not err in denying the defendant's motion to strike an illegal sentence because the special condition of probation the trial court imposed, requiring the defendant to register as a sex offender, was required by the sex-offender registration statute, O.C.G.A. § 42-1-12. Moreover, the facts supporting the requirement that the defendant register as a sex offender, that the defendant committed conduct that was a sexual offense against a minor, were found by the jury. The sex-offender registry requirement is regulatory and not

punitive in nature. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

Sentence of 30 years, 15 to serve, proper. — Defendant, who was indicted for violating O.C.G.A. § 42-1-12 “on or about April 4, 2007, the exact date being unknown”, was properly sentenced to 30 years, to serve 15 imprisoned, because an amendment to § 42-1-12 that was effective July 1, 2006, increased the sentencing range from one-to-three years to ten-to-thirty years. *Relaford v. State*, 306 Ga. App. 549, 702 S.E.2d 776 (2010), cert. denied, No. S11C0429, 2011 Ga. LEXIS 576.

Life sentence for failing to register unconstitutional. — Imposition of a mandatory sentence of life imprisonment imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

Cited in *Turner v. State*, 231 Ga. App. 747, 500 S.E.2d 628 (1998); *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998); *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009); *Bell v. State*, 323 Ga. App. 751, 748 S.E.2d 114 (2013).

Evidence and Procedural Issues

No written findings of fact or conclusions of law required. — By the statute’s plain terms, O.C.G.A. § 42-1-12 specifies the criterion the trial court must consider in determining whether to grant a petition for relief from the statute’s registration requirements for sexual offenders, namely, the risk that the petitioner will reoffend, but the statute does not state that the trial court’s order granting or denying a petition must include written findings of fact or conclusions of law. *In re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

Motion to quash indictment untimely. — Defendant’s motion to quash an indictment and a subsequent motion to quash a failure to register as a sex offender count under O.C.G.A. § 42-1-12 were properly denied; the defendant waived the right to challenge the form of

the failure to register count of the indictment because the defendant’s motion was not made before entry of a not guilty plea and even if § 17-7-110 applied to the filing of the defendant’s motion, it was untimely under that statute as well. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Motion to sever properly denied. — Defendant’s motion to sever the failure to register as a sex offender counts under O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the charges involved a series of acts which were connected together; (2) the case was not so complex as to impair the jury’s ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt; moreover, evidence of the conduct underlying the defendant’s conviction of a sex offense in North Carolina was admissible as a similar transaction. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Retroactive registration of sex offenders is nonpunitive. — Trial court properly denied a defendant’s motion to remove the defendant from the sex offender registry, or in the alternative to be resentenced as a first offender, as the United States Supreme Court had already determined that retroactive registration of sex offenders was nonpunitive and did not constitute an ex post facto law, and to resentence the defendant as a first offender would be in direct contravention of the plain language of O.C.G.A. §§ 17-10-6.1 and 42-1-12 since the defendant pled guilty but mentally ill to kidnapping a child under the age of 14, which was a serious violent felony. *Finnicum v. State*, 296 Ga. App. 86, 673 S.E.2d 604 (2009).

Registration for first offender. — Georgia superior court properly required a first offender to register as a sex offender pursuant to O.C.G.A. § 42-1-12 as both the 2005 and 2006 amendments to the statute dictated registration, and despite the fact that registration was not

Evidence and Procedural Issues (Cont'd)

part of the first offender's plea agreement, as neither the court nor the prosecutor had the power to exempt the first offender from the adoption of new rules regarding registration entered after the plea. *Peters v. Donald*, 282 Ga. App. 714, 639 S.E.2d 345 (2006).

Residence, not domicile. — Trial court properly denied a defendant's motion for a directed verdict on a count alleging that the defendant failed to register as a sex offender under O.C.G.A. § 42-1-12 as that section did not speak to the concept of "domicile," but to residence address and moving and residence included an intent to live in a place for the time being; although the state did not show exactly where the defendant resided after leaving the county, it showed that the defendant left the county and lived outside the state for more than a year without informing the county sheriff of a change in residence address, as required by law. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

In a declaratory action suit brought by a registered sex offender, former O.C.G.A. § 42-1-15(a) was held unconstitutional as to the sex offender's residence, which was acquired prior to a child care facility locating itself within 1,000 feet of the property, as forcing the sex offender from the home was a regulatory taking of the property without just and adequate compensation. However, no regulatory taking occurred with regard to prohibiting the sex offender from physically working at a business, pursuant to former § 42-1-15(b)(1), in which the sex offender held an ownership interest in as there existed no prohibition on owning a business within 1,000 feet of any child care facility, church, school, or other area where minors congregated and the sex offender failed to show that physically working at the premises was necessary. *Mann v. Ga. Dep't of Corr.*, 282 Ga. 754, 653 S.E.2d 740 (2007).

Change of residence. — Trial court's conclusion that the state failed to present any competent evidence showing that the defendant had changed residences was erroneous because in the court's assess-

ment of the evidence, the trial court erroneously determined that an investigator's testimony amounted to inadmissible hearsay; the investigator's testimony as to the declaration of the defendant's father that the defendant no longer lived at that residence was admissible as a prior inconsistent statement and was admissible as substantive evidence of the defendant's guilt. Moreover, the circumstances presented by the evidence would authorize a rational trier of fact to find that the defendant had intended to change residences without notifying the local authorities as required; the evidence showed that the defendant had been living at the defendant's mother's residence for over two weeks, had not returned to the defendant's father's residence by the time the defendant was arrested, had failed to report for a scheduled meeting with a probation officer, and had not contacted the probation officer to explain the defendant's failure to report for the meeting or to provide any information as to the defendant's current residential status. *State v. Canup*, 300 Ga. App. 678, 686 S.E.2d 275 (2009).

Sufficient evidence to support conviction of failure to notify of change of residence. — Since the defendant's release to probation occurred after the effective date of the registration statute and the evidence proved that the defendant was required to register under O.C.G.A. § 42-1-12(e)(4), the evidence was sufficient to support the conviction for failure of a registered sex offender to report a change in residence prior to moving. *Pardon v. State*, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Evidence of convictions admissible in trial for failure to notify of address change. — In a defendant's trial for failure to notify the sheriff of changes in the defendant's address as required by O.C.G.A. § 42-1-12 based on the defendant's past rape conviction, the defendant's counsel was not ineffective in failing to object to admission of the defendant's past convictions for burglarizing and robbing the defendant's parents. Such evidence was admissible to impeach the defendant's testimony that the defendant had lived with the defendant's par-

ents at their home without interruption. *Relafor v. State*, 306 Ga. App. 549, 702 S.E.2d 776 (2010), cert. denied, No. S11C0429, 2011 Ga. LEXIS 576.

Registration requirement for first offender under former law. — Trial court's denial of a defendant's motion for an out-of-time appeal was proper with respect to the defendant's claim that counsel was ineffective for failing to object to testimony by a probation officer as the officer's statement that under former O.C.G.A. § 42-1-2(a)(3), the defendant did not have to register as a sex offender if the defendant was afforded treatment as a first offender was a correct statement of law at the time; accordingly, counsel's failure to object thereto was not ineffective-ness as any such objection would have lacked merit. *Ethridge v. State*, 283 Ga. App. 289, 641 S.E.2d 282 (2007).

Denial of petition for release from requirement to register. — Trial court did not abuse the court's discretion by denying the defendant's petition for release from the requirement to register as a sexual offender for life as the defendant failed to make a prima facie showing that the defendant was no longer a substantial risk of reoffending since an agency abuse case was pending against the defendant, which required a child of the defendant to not bring any children around the defendant, and defendant characterized the conduct involving the child molestation of the defendant's three children as a mistake which everyone makes. *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008).

Trial court erred by denying a defendant's petition for release from the requirement that the defendant register as a sexual offender, pursuant to O.C.G.A. § 42-1-12, since the defendant's Texas conviction involving the use of the defendant's position as a clergyman to sexually assault two victims was not similar enough to any Georgia criminal statute that would have found the defendant to have been convicted of committing a dangerous sexual offense as that term was defined in § 42-1-12(1)(10)(A). *Sharma v. State*, 294 Ga. App. 783, 670 S.E.2d 494 (2008).

Trial court did not abuse the court's

discretion by denying a defendant's petition seeking relief from the sexual offender registration requirements, pursuant to O.C.G.A. § 42-1-12, because the defendant failed to provide a report from a licensed psychiatrist that allegedly set forth an opinion that the defendant posed no threat whatsoever of reoffending. Further, the defendant failed to provide any additional information regarding the underlying conduct for the out-of-state conviction that required the registration. *In re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

Confinement in probation detention center impacting registration period. — Defendant's confinement in a probation detention center was not equivalent to confinement in prison for purposes of O.C.G.A. § 42-1-12(g) because under O.C.G.A. § 42-8-34.1(c), such centers were alternatives to confinement in prison, and therefore the 10-year waiting period for release from sex offender registration requirements did not begin running upon the defendant's release from the center, but from the date the defendant was released from probation. *In re White*, 306 Ga. App. 365, 702 S.E.2d 694 (2010).

Probation condition overbroad and vague. — Upon convicting the defendant of sexual battery under O.C.G.A. § 16-6-22.1, special probation conditions 4, 5, and 6 were erroneously imposed as those conditions lacked reasonable specificity and encompassed groups and locations not rationally related to the sentencing objectives and failed to give the defendant notice of either the conduct or the groups to avoid. *Grovenstein v. State*, 282 Ga. App. 109, 637 S.E.2d 821 (2006).

No contest plea properly admitted. — Trial court did not err in admitting into evidence a no contest plea and in "making reference" to the plea with regard to the similar transaction evidence as the defendant's failure to object to the introduction of the evidence precluded review of the issue on appeal; further, the plea was admissible to show a conviction for purposes of the defendant's alleged failure to register as a sex offender under former O.C.G.A. § 42-1-12 and the jury was permitted to consider the plea as similar

Evidence and Procedural Issues (Cont'd)

transaction evidence. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Lack of knowledge of registration requirements not a defense. — Defendant's conviction for filing false information with the Georgia Sex Offender Registry, in violation of O.C.G.A. § 42-1-12(n), was upheld. The defendant's claimed lack of knowledge of the registration requirements was no excuse and was refuted by the fact that the defendant had filed registration notification forms. *Scott v. State*, 303 Ga. App. 672, 695 S.E.2d 71 (2010).

Failure to advise defendant of requirement to register as sex offender. — Trial court erred in denying the defendant's motion to withdraw the defendant's guilty plea to two counts of child molestation because defendant's trial counsel failed to advise the defendant that entering a plea of guilty to child molestation would necessitate that the defendant comply with the requirements of the state's sex offender registry statute, O.C.G.A. § 42-1-12; the defendant was subject to the sex offender registration requirements at the time that the defendant entered into defendant's plea, the terms of the sex offender registry statute were succinct, clear, and explicit in setting forth the consequences of defendant's guilty plea, and the defendant's trial counsel could have readily determined that the defendant was required to register and conveyed that information to the defendant. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Trial counsel's failure to advise a client that pleading guilty will require the defendant to register as a sex offender is constitutionally deficient performance. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Ineffective assistance of counsel found. — In a 28 U.S.C. § 2254 case in which a defendant was challenging the conviction under O.C.G.A. § 42-1-12, the determination of the Georgia Court of Appeals that trial counsel's failure to challenge the use of the defendant's conviction under an unconstitutional anti-sodomy statute, O.C.G.A. § 16-6-2(a)(1), to con-

vict the defendant for failure to register as a sex offender was not ineffective assistance resulted in a decision that was an unreasonable application of federal law. *Green v. Georgia*, 2013 U.S. Dist. LEXIS 173003 (N.D. Ga. Dec. 9, 2013).

Registration Required

Attempt crimes required registration. — Defendant was properly ordered to register as a sex offender because the convictions constituted criminal offenses against a victim who was a minor, pursuant to O.C.G.A. § 42-1-12, because the attempt convictions pursuant to O.C.G.A. § 16-4-1 were covered within the registration requirement; the defendant was convicted of criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes, in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-5(a), respectively, as the defendant communicated over the Internet with a police officer who was disguised as a 14-year-old girl, and arranged to meet the alleged girl, and the fact that an actual child was not involved did not negate the offense or the need for the registration as there was no impossibility defense. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

Because the crime of attempt to commit rape was related to a sexually violent offense, the defendant was properly required to comply with the registration requirements of O.C.G.A. § 42-1-12, and the trial court did not err in convicting the defendant for violating the registry statute. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

Registration for public indecency proper. — Offense of public indecency, O.C.G.A. § 16-6-8, was not a victimless crime and, therefore, a perpetrator thereof may have been required to register under O.C.G.A. § 42-1-12; the trial court did not err in requiring the defendant to register as a condition of the defendant's sentence for public indecency. *Brown v. State*, 270 Ga. App. 176, 605 S.E.2d 885 (2004).

Because the defendant's sex offender registration as part of probation was limited to the maximum sentence allowed by law as punishment for that crime, the

trial court did not improperly give the defendant an indeterminate sentence by requiring the defendant to register as a sexual offender following the defendant's conviction for felony public indecency. *Loya v. State*, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

Registration required when convicted as child sex offender. — Defendant was properly ordered to register as a sex offender after a conviction for cruelty to a child since the cruelty as stated in the indictment was rape of a minor, a threat to arrest and jail the victim, and force used to make the victim touch the defendant's penis. *Wiggins v. State*, 272 Ga. App. 414, 612 S.E.2d 598 (2005), *aff'd in part and rev'd in part*, 280 Ga. 268, 626 S.E.2d 118 (2006).

As the indictments made it clear that the underlying conduct for the two aggravated assaults to which the defendant entered Alford pleas was the oral sodomy of one minor and the rape of another, and the defendant was held to have notice of all lesser crimes shown by the facts alleged in the indictment, the defendant was required to register as a sex offender under O.C.G.A. § 42-1-12. *Rogers v. State*, 297 Ga. App. 655, 678 S.E.2d 125 (2009).

Evidence was sufficient to support the defendant's conviction of failure to register as a sex offender, as required by O.C.G.A. § 42-1-12, because when the defendant was charged with failure to register the defendant was required to register as a sex offender since the defendant had been convicted of criminal sexual conduct toward a minor in violation of O.C.G.A. § 16-6-2, and the supreme court's ruling that § 16-6-2 infringed upon the right of privacy had to be applied retroactively on collateral review, but the court of appeals could not apply it in the defendant's case since it was not on collateral review; the appeal was from a conviction for failure to register as a sex offender, which was a proceeding separate from defendant's original offense, and at the time of the defendant's sodomy conviction, the conduct in which the defendant engaged was against the law in Georgia. *Green v. State*, 303 Ga. App. 210, 692 S.E.2d 784 (2010).

Because the addendum to the defen-

dant's sentence purported to impose restrictions upon the defendant's future parole, if granted, the sentence was a nullity; however, in light of the testimony and the nature of the offense of which the defendant was convicted, incest, the conditions of probation imposed were reasonable and were not vague or overly broad because several of the conditions imposed were specifically mandated by O.C.G.A. § 42-1-12, and even if the trial court had not specifically imposed sex offender registration as a condition of probation, the defendant was nonetheless required by statute to register. *Stephens v. State*, 305 Ga. App. 339, 699 S.E.2d 558 (2010).

Perpetrator 18 and victim 13 required registration. — Trial court properly held that the defendant, who was convicted of a statutory rape that occurred when the defendant was 18 and the victim was 13, had to register as a sex offender. Because the victim was under 14, the case did not fall within the exception of O.C.G.A. § 42-1-12(a)(9)(C) for misdemeanor statutory rape under O.C.G.A. § 16-6-3(c); moreover, the defendant was prosecuted in superior court, not juvenile court. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

Registration required when crime against minor. — Based on the allegations in the defendant's second indictment that the defendant sucked on the breasts of a minor under the age of 16, the trial court was authorized to conclude that the defendant committed a criminal offense against a victim who was a minor and was thus subject to the registration requirements and conditions in O.C.G.A. § 42-1-12. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Electronically furnishing obscene materials required registration. — Detective erroneously promised during an interview that a defendant would not be charged with an offense that required sex offender registration because a conviction for electronically furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1 would require registration as a sex offender under O.C.G.A. § 42-1-12(e)(2); prior to the erroneous promise, the defendant's confession was voluntarily made under former O.C.G.A.

Registration Required (Cont'd)

§ 24-3-50 (see now O.C.G.A. § 24-8-824) as the confession was made without the slightest hope of benefit. *State v. Lee*, 295 Ga. App. 49, 670 S.E.2d 879 (2008).

Internet sex crimes required registration. — Defendant's convictions under the computer pornography and child exploitation act, O.C.G.A. § 16-12-100.2, required registration as a sex offender pursuant to O.C.G.A. § 42-1-12, as the conviction for pornography and child exploitation under § 16-12-100.2(d) for the use of an on-line Internet service in the attempt to commit child molestation, was within the definition of a "criminal offense against a victim who was a minor," pursuant to § 42-1-12; the defendant had communicated with a police officer who posed as a 14-year-old girl, sent her sexually explicit messages, and arranged a meeting with her. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

Registration for "criminal offense against a minor" based on communication over the Internet. — Trial court properly ordered the defendant to register as a sex offender, pursuant to O.C.G.A. § 42-1-12, although the defendant's convictions did not fit within the category of "sexually violent offenses," pursuant to § 42-1-12, as the offenses were all within the "criminal offense against a victim who was a minor" category, pursuant to § 42-1-12, based on a strict construction of the registration statute, pursuant to the statutory interpretation rules under O.C.G.A. § 1-3-1(a); the defendant's convictions arose for communications over the Internet with a police officer who posed as a young girl, and the defendant sent her sexually explicit messages and arranged a meeting with her, at which time the defendant was arrested. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

Conduct alleged in indictment satisfied definition of sexual offense and

required registration. — As a defendant entered an Alford plea to two counts of cruelty to children by committing the acts alleged in the indictment, the defendant acknowledged touching the breast and buttocks of the 14-year-old victim and although the defendant did not plead guilty to a sexual offense, the defendant pled guilty to conduct which, by the conduct's nature, was a sexual offense against a minor. Therefore, the defendant was required to register as a sexual offender under O.C.G.A. § 42-1-12(e)(1). *Morrell v. State*, 297 Ga. App. 592, 677 S.E.2d 771 (2009).

Registration Not Required

Registration not required for sentence imposed before effective date of act. — O.C.G.A. § 42-1-12(a)(3) applied to sentences imposed on or after July 1, 2004, and thus, when the defendant was sentenced in December 2001, the new statutory language did not apply and the defendant did not need to register as a sex offender. *State v. Plunkett*, 277 Ga. App. 605, 627 S.E.2d 182 (2006).

Sex offender registration not required after successful completion of first offender sentence. — Defendant was not required to register as a sexual offender because the defendant successfully completed a first-offender sentence for statutory rape and burglary charges, and a "conviction" under O.C.G.A. § 42-1-12(a)(8) did not include a discharge without an adjudication of guilt following the successful completion of a first offender sentence; the plain language of O.C.G.A. § 42-8-62(a) provided that, with certain exceptions, once a first offender was discharged without an adjudication of guilt, he or she stood completely exonerated and was not considered as having been convicted of a crime. *Jackson v. State*, 299 Ga. App. 356, 683 S.E.2d 60 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Release of information by sheriff. — Sheriff must release relevant information

relating to sexually violent predators; however, the sheriff is given the authority

to determine what information and in what manner such information will be released. 1997 Op. Att’y Gen. No. U97-23.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statute including “sexually motivated offenses” within definition of sex offense for purposes of sentencing or classification of defendant as sex offender, 30 ALR6th 373.

Validity, construction, and application of state statutes imposing criminal penalties for failure to register as required under sex offender or other criminal registration statutes, 33 ALR6th 91.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to juvenile offenders — Constitutional issues, 37 ALR6th 55.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to juvenile offenders — duty to register, requirements for registration, and procedural matters, 38 ALR6th 1.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to

juvenile offenders — expungement, stay or deferral, exceptions, exemptions, and waiver, 39 ALR6th 577.

Court’s duty to advise sex offender as to sex offender registration consequences or other restrictions arising from plea of guilty, or to determine that offender is advised thereof, 41 ALR6th 141.

Application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 6 A.L.R. Fed. 2d 619 (2004), to Sex Offender Registration Statutes, 51 ALR6th 139.

Validity, construction, and application of state sex offender registration statutes concerning level of classification — Initial classification determination, 65 ALR6th 1.

Validity, construction, and application of federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. § 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

42-1-13. Sexual Offender Registration Review Board; composition; appointment; administration and duties; immunity from liability.

(a) The Sexual Offender Registration Review Board shall be composed of three professionals licensed under Title 43 and knowledgeable in the field of the behavior and treatment of sexual offenders; at least one representative from a victims’ rights advocacy group or agency; and at least two representatives from law enforcement, each of whom is either employed by a law enforcement agency as a certified peace officer under Title 35 or retired from such employment. The members of the board shall be appointed by the commissioner of behavioral health and developmental disabilities for terms of four years. On and after July 1, 2006, successors to the members of the board shall be appointed by the Governor. Members of the board shall take office on the first day of September immediately following the expired term of that office and shall serve for a term of four years and until the appointment of their respective successors. No member shall serve on the board more than two consecutive terms. Vacancies occurring on the board, other than those caused by expiration of a term of office, shall be filled in the same

manner as the original appointment to the position vacated for the remainder of the unexpired term and until a successor is appointed. Members shall be entitled to an expense allowance and travel cost reimbursement the same as members of certain other boards and commissions as provided in Code Section 45-7-21.

(b) The board shall be attached to the Department of Behavioral Health and Developmental Disabilities for administrative purposes and, provided there is adequate funding, shall:

(1) Exercise its quasi-judicial, rule-making, or policy-making functions independently of the department and without approval or control of the department;

(2) Prepare its budget, if any, and submit its budgetary requests, if any, through the department; and

(3) Hire its own personnel, including but not limited to administrative personnel and clinical evaluators.

(c) Any investigator who, as of June 30, 2012, was employed by the board shall be transferred to the Georgia Bureau of Investigation on July 1, 2012, and shall no longer be under the administration or supervision of the board, except as required to provide the board with information as set forth in paragraph (15) of subsection (a) of Code Section 35-3-4. The executive director of the board shall arrange administratively for the transfer of any equipment relating to the transfer of such personnel.

(d) Members of the board shall be immune from liability for good faith conduct under this article. (Code 1981, § 42-1-13, enacted by Ga. L. 2006, p. 379, § 24/HB 1059; Ga. L. 2009, p. 453, §§ 3-2, 3-3/HB 228; Ga. L. 2012, p. 985, § 2/HB 895.)

The 2012 amendment, effective July 1, 2012, substituted “, including but not limited to administrative personnel and clinical evaluators” for “if authorized by the Constitution of this state or by statute or if the General Assembly provides or authorizes the expenditure of funds therefor” in paragraph (b)(3); added subsection (c); and redesignated former subsection (c) as present subsection (d).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, “paragraph (15) of subsection (a) of Code Section 35-3-4” was substituted for “paragraph (14) of subsection (a) of Code Section 35-3-4” in the first sentence of subsection (c).

Editor’s notes. — Ga. L. 2006, p. 379,

§ 24/HB 1059, July 1, 2006, repealed the former Code section and enacted the current Code section. The former Code section, pertaining to registered sex offenders residing within areas in which minors congregate, was based on Code 1981, § 42-1-13, enacted by Ga. L. 2003, p. 878, § 1. For present similar provisions, see Code Section 42-1-15.

Ga. L. 2006, p. 379, § 30/HB 1059, not codified by the General Assembly, provides, in part, that: “(b) Any person required to register pursuant to the provisions of Code Section 42-1-12, relating to the state sexual offender registry, and any person required not to reside within areas where minors congregate, as prohibited by Code Section 42-1-13, shall not be relieved

of the obligation to comply with the provisions of said Code sections by the repeal and reenactment of said Code sections.

“(c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Administrative rules and regulations. — The Georgia Sexually Violent Offender Registry, Official Compilation of

the Rules and Regulations of the State of Georgia, Georgia Crime Information Center Council, Practice and Procedure, Chapter 140-2.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For annual survey on administrative law, see 64 Mercer L. Rev. 39 (2012).

For note, “Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?,” see 40 Ga. L. Rev. 961 (2006).

JUDICIAL DECISIONS

Registration for first offender. — Georgia superior court properly required a first offender to register as a sex offender pursuant to O.C.G.A. § 42-1-12 as both the 2005 and 2006 amendments to the statute dictated registration, and despite the fact that registration was not part of the first offender’s plea agreement,

as neither the court nor the prosecutor had the power to exempt the first offender from the adoption of new rules regarding registration entered after the plea. *Peters v. Donald*, 282 Ga. App. 714, 639 S.E.2d 345 (2006).

Cited in *Watson v. State*, 283 Ga. App. 635, 642 S.E.2d 328 (2007).

RESEARCH REFERENCES

ALR. — Validity of statutes imposing residency restrictions on registered sex offenders, 25 ALR6th 227.

Validity, construction, and application of federal Sex Offender Registration and

Notification Act (SORNA), 42 U.S.C.A. § 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

42-1-14. Risk assessment classification; classification as “sexually dangerous predator”; electronic monitoring.

(a)(1) The board shall determine the likelihood that a sexual offender will engage in another crime against a victim who is a minor or a dangerous sexual offense. The board shall make such determination for any sexual offender convicted on or after July 1, 2006, of a criminal offense against a victim who is a minor or a dangerous sexual offense and for any sexual offender incarcerated on July 1, 2006, but convicted prior to July 1, 2006, of a criminal offense against a victim who is a minor. Any sexual offender who changes residence from another state or territory of the United States or any other place to this state and who is not already designated under Georgia law as a sexually dangerous predator, sexual predator, or a sexually violent predator shall have his or her required registration information forwarded by the sheriff of his or her county of registration to the board for the purpose of risk assessment classification. The board shall also make such determination upon the request of a superior

court judge for purposes of considering a petition to be released from registration restrictions or residency or employment restrictions as provided for in Code Section 42-1-19.

(2) A sexual offender shall be placed into Level I risk assessment classification, Level II risk assessment classification, or sexually dangerous predator classification based upon the board's assessment criteria and information obtained and reviewed by the board. The sexual offender may provide the board with information, including, but not limited to, psychological evaluations, sexual history polygraph information, treatment history, and personal, social, educational, and work history and may agree to submit to a psychosexual evaluation or sexual history polygraph conducted by the board. If the sexual offender has undergone treatment through the Department of Corrections, such treatment records shall also be submitted to the board for evaluation. The prosecuting attorney shall provide the board with any information available to assist the board in rendering an opinion, including, but not limited to, criminal history and records related to previous criminal history. The board shall utilize the Georgia Bureau of Investigation to assist it in obtaining information relative to its evaluation of sexual offenders and the Georgia Bureau of Investigation shall provide the board with information as requested by the board. The board shall be authorized to obtain information from supervision records of the Board of Pardons and Paroles regarding such sexual offender, but such records shall remain confidential state secrets in accordance with Code Section 42-9-53 and shall not be made available to any other person or entity or be subject to subpoena unless declassified by the State Board of Pardons and Paroles. The clerk of court shall send a copy of the sexual offender's conviction to the board and notify the board that a sexual offender's evaluation will need to be performed. The board shall render its recommendation for risk assessment classification within:

(A) Sixty days of receipt of a request for an evaluation if the sexual offender is being sentenced pursuant to subsection (c) of Code Section 17-10-6.2;

(B) Six months prior to the sexual offender's proposed release from confinement if the offender is incarcerated;

(C) Sixty days of receipt of the required registration information from the sheriff when the sexual offender changes residence from another state or territory of the United States or any other place to this state and is not already classified;

(D) Sixty days if the sexual offender is sentenced to a probated or suspended sentence; and

(E) Ninety days if such classification is requested by the court pursuant to a petition filed under Code Section 42-1-19.

(3) The board shall notify the sex offender by first-class mail of its determination of risk assessment classification and shall send a copy of such classification to the Georgia Bureau of Investigation, the Department of Corrections, the sheriff of the county where the sexual offender is registered, and the sentencing court, if applicable.

(b) If the board determines that a sexual offender should be classified as a Level II risk assessment classification or as a sexually dangerous predator, the sexual offender may petition the board to reevaluate his or her classification. To file a petition for reevaluation, the sexual offender shall be required to submit his or her written petition for reevaluation to the board within 30 days from the date of the letter notifying the sexual offender of his or her classification. The sexual offender shall have 60 days from the date of the notification letter to submit information as provided in subsection (a) of this Code section in support of the sexual offender's petition for reevaluation. If the sexual offender fails to submit the petition or supporting documents within the time limits provided, the classification shall be final. The board shall notify the sexual offender by first-class mail of its decision on the petition for reevaluation of risk assessment classification and shall send a copy of such notification to the Georgia Bureau of Investigation, the Department of Corrections, the sheriff of the county where the sexual offender is registered, and the sentencing court, if applicable.

(c) A sexual offender who is classified by the board as a Level II risk assessment classification or as a sexually dangerous predator may file a petition for judicial review of his or her classification within 30 days of the date of the notification letter or, if the sexual offender has requested reevaluation pursuant to subsection (b) of this Code section, within 30 days of the date of the letter denying the petition for reevaluation. The petition for judicial review shall name the board as defendant, and the petition shall be filed in the superior court of the county where the offices of the board are located. Within 30 days after service of the appeal on the board, the board shall submit a summary of its findings to the court and mail a copy, by first-class mail, to the sexual offender. The findings of the board shall be considered prima-facie evidence of the classification. The court shall also consider any relevant evidence submitted, and such evidence and documentation shall be mailed to the parties as well as submitted to the court. The court may hold a hearing to determine the issue of classification. The court may uphold the classification of the board, or, if the court finds by a preponderance of the evidence that the sexual offender is not placed in the appropriate classification level, the court shall place the sexual offender in the appropriate risk assessment classification. The court's determination shall be forwarded by the clerk of the court to the board, the sexual offender, the Georgia Bureau of Investigation, and the sheriff of the county where the sexual offender is registered.

(d) Any individual who was classified as a sexually violent predator prior to July 1, 2006, shall be classified as a sexually dangerous predator on and after July 1, 2006.

(e) Any sexually dangerous predator shall be required to wear an electronic monitoring system that shall have, at a minimum:

(1) The capacity to locate and record the location of a sexually dangerous predator by a link to a global positioning satellite system;

(2) The capacity to timely report or record a sexually dangerous predator's presence near or within a crime scene or in a prohibited area or the sexually dangerous predator's departure from specific geographic locations; and

(3) An alarm that is automatically activated and broadcasts the sexually dangerous predator's location if the global positioning satellite monitor is removed or tampered with by anyone other than a law enforcement official designated to maintain and remove or replace the equipment.

Such electronic monitoring system shall be worn by a sexually dangerous predator for the remainder of his or her natural life. The sexually dangerous predator shall pay the cost of such system to the Department of Corrections if the sexually dangerous predator is on probation; to the State Board of Pardons and Paroles if the sexually dangerous predator is on parole; and to the sheriff after the sexually dangerous predator completes his or her term of probation and parole or if the sexually dangerous predator has moved to this state from another state, territory, or country. The electronic monitoring system shall be placed upon the sexually dangerous predator prior to his or her release from confinement. If the sexual offender is not in custody, within 72 hours of the decision classifying the sexual offender as a sexually dangerous predator in accordance with subsection (b) of this Code section, the sexually dangerous predator shall report to the sheriff of the county of his or her residence for purposes of having the electronic monitoring system placed on the sexually dangerous predator.

(f) In addition to the requirements of registration for all sexual offenders, a sexually dangerous predator shall report to the sheriff of the county where such predator resides six months following his or her birth month and update or verify his or her required registration information. (Code 1981, § 42-1-14, enacted by Ga. L. 2006, p. 379, § 24/HB 1059; Ga. L. 2010, p. 168, § 12/HB 571; Ga. L. 2010, p. 878, § 42/HB 1387; Ga. L. 2011, p. 752, § 42/HB 142; Ga. L. 2012, p. 985, § 3/HB 895; Ga. L. 2013, p. 1056, § 1/HB 122.)

The 2012 amendment, effective July 1, 2012, added the fifth sentence of paragraph (a)(2).

The 2013 amendment, effective July 1, 2013, added the sixth sentence in paragraph (a)(2).

Editor's notes. — Ga. L. 2006, p. 379, § 30/HB 1059, not codified by the General Assembly, provides, in part, that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2010, p. 878, § 54(e), not codified by the General Assembly, provides: "In the event of an irreconcilable conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2010 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to subsection (a) of this Code section by Ga. L. 2010, 878, § 42, was not given effect.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006).

JUDICIAL DECISIONS

Cited in Taylor v. State, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

RESEARCH REFERENCES

ALR. — Admissibility of actuarial risk assessment testimony in proceeding to commit sex offender, 20 ALR6th 607.

Validity, construction, and application of state sex offender registration statutes concerning level of classification — Claims for downward departure, 66 ALR6th 1.

Validity, construction, and application of state sex offender registration statutes

concerning level of classification — Claims challenging upward departure, 67 ALR6th 1.

Validity, construction, and application of federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. § 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

42-1-15. Restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action.

(a) As used in this Code section, the term:

(1) "Individual" means a person who is required to register pursuant to Code Section 42-1-12.

(2) "Lease" means a right of occupancy pursuant to a written and valid lease or rental agreement.

(3) "Minor" means any person who is under 18 years of age.

(4) "Volunteer" means to engage in an activity in which one could be, and ordinarily would be, employed for compensation, and which activity involves working with, assisting, or being engaged in activ-

ities with minors; provided, however, that such term shall not include participating in activities limited to persons who are 18 years of age or older or participating in worship services or engaging in religious activities or activities at a place of worship that do not include supervising, teaching, directing, or otherwise participating with minors who are not supervised by an adult who is not an individual required to register pursuant to Code Section 42-1-12.

(b) On and after July 1, 2008, no individual shall reside within 1,000 feet of any child care facility, church, school, or area where minors congregate if the commission of the act for which such individual is required to register occurred on or after July 1, 2008. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, church, school, or area where minors congregate at their closest points.

(c)(1) On and after July 1, 2008, no individual shall be employed by or volunteer at any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church if the commission of the act for which such individual is required to register occurred on or after July 1, 2008. Such distance shall be determined by measuring from the outer boundary of the property of the location at which such individual is employed or volunteers to the outer boundary of the child care facility, school, or church at their closest points.

(2) On or after July 1, 2008, no individual who is a sexually dangerous predator shall be employed by or volunteer at any business or entity that is located within 1,000 feet of an area where minors congregate if the commission of the act for which such individual is required to register occurred on or after July 1, 2008. Such distance shall be determined by measuring from the outer boundary of the property of the location at which the sexually dangerous predator is employed or volunteers to the outer boundary of the area where minors congregate at their closest points.

(d) Notwithstanding any ordinance or resolution adopted pursuant to Code Section 16-6-24 or subsection (d) of Code Section 16-11-36, it shall be unlawful for any individual to loiter, as prohibited by Code Section 16-11-36, at any child care facility, school, or area where minors congregate.

(e)(1) If an individual owns or leases real property and resides on such property and a child care facility, church, school, or area where minors congregate thereafter locates itself within 1,000 feet of such property, or if an individual has established employment at a location and a child care facility, church, or school thereafter locates itself

within 1,000 feet of such employment, or if a sexual predator has established employment and an area where minors congregate thereafter locates itself within 1,000 feet of such employment, such individual shall not be guilty of a violation of subsection (b) or (c) of this Code section, as applicable, if such individual successfully complies with subsection (f) of this Code section.

(2) An individual owning or leasing real property and residing on such property or being employed within 1,000 feet of a prohibited location, as specified in subsection (b) or (c) of this Code section, shall not be guilty of a violation of this Code section if such individual had established such property ownership, leasehold, or employment prior to July 1, 2008, and such individual successfully complies with subsection (f) of this Code section.

(f)(1) If an individual is notified that he or she is in violation of subsection (b) or (c) of this Code section, and if such individual claims that he or she is exempt from such prohibition pursuant to subsection (e) of this Code section, such individual shall provide sufficient proof demonstrating his or her exemption to the sheriff of the county where the individual is registered within ten days of being notified of any such violation.

(2) For purposes of providing proof of residence, the individual may provide a driver's license, government issued identification, or any other documentation evidencing where the individual's habitation is fixed. For purposes of providing proof of property ownership, the individual shall provide a copy of his or her warranty deed, quitclaim deed, or voluntary deed, or other documentation evidencing property ownership.

(3) For purposes of providing proof of a leasehold, the individual shall provide a copy of the applicable lease agreement. Leasehold exemptions shall only be for the duration of the executed lease.

(4) For purposes of providing proof of employment, the individual may provide an Internal Revenue Service Form W-2, a pay check, or a notarized verification of employment from the individual's employer, or other documentation evidencing employment. Such employment documentation shall evidence the location in which such individual actually carries out or performs the functions of his or her job.

(5) Documentation provided pursuant to this subsection may be required to be date specific, depending upon the individual's exemption claim.

(g) Any individual who knowingly violates this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years.

(h) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under Code Section 42-1-12. (Code 1981, § 42-1-15, enacted by Ga. L. 2008, p. 680, § 4/SB 1; Ga. L. 2010, p. 168, § 13/HB 571.)

Editor's notes. — This Code section formerly pertained to restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action. The former Code section was based on Ga. L. 2006, p. 379, § 24/HB 1059.

Law reviews. — For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008). For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

For comment, “‘An Era of Human Zoning’: Banning Sex Offenders from Communities Through Residence and Work Restrictions,” see 57 Emory L.J. 1347 (2008).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the subject matter, decisions under former Code 1981, § 42-1-13, enacted by Ga. L. 2003, p. 878, § 1 and former O.C.G.A. § 42-1-15, are included in the annotations for this Code section.

Statute not unconstitutional ex post facto law. — Even though former O.C.G.A. § 42-1-13 was passed after a sex offender's statutory rape conviction, and used the prior conviction as an element of a future offense, it was not an ex post facto law since it only punished a future offense, which punishment was enhanced by the prior conviction, and the sex offender could only have been punished under former § 42-1-13 if the offender prospectively chose to violate the statute by continuing to live at the offender's current home; the fact that the prior conviction subjected the sex offender to possible punishment under former § 42-1-13 did not make the statute into an unconstitutional ex post facto law. *Denson v. State of Ga.*, 267 Ga. App. 528, 600 S.E.2d 645 (2004) (decided under former O.C.G.A. § 42-1-13).

Unconstitutional when applied to sex offender's residence. — In a declaratory action suit brought by a registered sex offender, former O.C.G.A. § 42-1-15(a) was held unconstitutional as to the sex offender's residence, which was acquired

prior to a child care facility locating itself within 1,000 feet of the property as forcing the sex offender from the home was a regulatory taking of the property without just and adequate compensation. However, no regulatory taking occurred with regard to prohibiting the sex offender from physically working at a business, pursuant to former § 42-1-15(b)(1), in which the sex offender held an ownership interest in as there existed no prohibition on owning a business within 1,000 feet of any child care facility, church, school, or other area where minors congregated and the sex offender failed to show that physically working at the premises was necessary. *Mann v. Ga. Dep't of Corr.*, 282 Ga. 754, 653 S.E.2d 740 (2007) (decided under former O.C.G.A. § 42-1-15).

Life sentence for failing to register unconstitutional. — Imposition of a mandatory sentence of life imprisonment imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008) (decided under former O.C.G.A. § 42-1-15).

Cited in *Stephens v. State*, 305 Ga. App. 339, 699 S.E.2d 558 (2010); *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

RESEARCH REFERENCES

ALR. — Validity of statutes imposing residency restrictions on registered sex offenders, 25 ALR6th 227.

Validity, construction, and application of statutory and municipal enactments and conditions of release prohibiting sex offenders from parks, 40 ALR6th 419.

Validity, construction, and application of federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. § 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

42-1-16. Definitions; employment restrictions for sexual offenders; penalties.

(a) As used in this Code section, the term:

(1) “Area where minors congregate” shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools.

(2) “Individual” means a person who is required to register pursuant to Code Section 42-1-12.

(3) “Lease” means a right of occupancy pursuant to a written and valid lease or rental agreement.

(4) “Minor” means any person who is under 18 years of age.

(b) Any individual who committed an act between July 1, 2006, and June 30, 2008, for which such individual is required to register shall not reside within 1,000 feet of any child care facility, church, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, church, school, or area where minors congregate at their closest points.

(c)(1) Any individual who committed an act between July 1, 2006, and June 30, 2008, for which such individual is required to register shall not be employed by any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church. Such distance shall be determined by measuring from the outer boundary of the property of the location at which such individual is employed to the outer boundary of the child care facility, school, or church at their closest points.

(2) Any individual who committed an act between July 1, 2006, and June 30, 2008, for which such individual is required to register who is a sexually dangerous predator shall not be employed by any business or entity that is located within 1,000 feet of an area where minors congregate. Such distance shall be determined by measuring

from the outer boundary of the property of the location at which the sexually dangerous predator is employed to the outer boundary of the area where minors congregate at their closest points.

(d) Notwithstanding any ordinance or resolution adopted pursuant to Code Section 16-6-24 or subsection (d) of Code Section 16-11-36, it shall be unlawful for any individual to loiter, as prohibited by Code Section 16-11-36, at any child care facility, school, or area where minors congregate.

(e)(1) If an individual owns or leases real property and resides on such property and a child care facility, church, school, or area where minors congregate thereafter locates itself within 1,000 feet of such property, or if an individual has established employment at a location and a child care facility, church, or school thereafter locates itself within 1,000 feet of such employment, or if a sexual predator has established employment and an area where minors congregate thereafter locates itself within 1,000 feet of such employment, such individual shall not be guilty of a violation of subsection (b) or (c) of this Code section, as applicable, if such individual successfully complies with subsection (f) of this Code section.

(2) An individual owning or leasing real property and residing on such property or being employed within 1,000 feet of a prohibited location, as specified in subsection (b) or (c) of this Code section, shall not be guilty of a violation of this Code section if such individual had established such property ownership, leasehold, or employment prior to July 1, 2006, and such individual successfully complies with subsection (f) of this Code section.

(f)(1) If an individual is notified that he or she is in violation of subsection (b) or (c) of this Code section, and if such individual claims that he or she is exempt from such prohibition pursuant to subsection (e) of this Code section, such individual shall provide sufficient proof demonstrating his or her exemption to the sheriff of the county where the individual is registered within ten days of being notified of any such violation.

(2) For purposes of providing proof of residence, the individual may provide a driver's license, government issued identification, or any other documentation evidencing where the individual's habitation is fixed. For purposes of providing proof of property ownership, the individual shall provide a copy of his or her warranty deed, quitclaim deed, or voluntary deed, or other documentation evidencing property ownership.

(3) For purposes of providing proof of a leasehold, the individual shall provide a copy of the applicable lease agreement. Leasehold exemptions shall only be for the duration of the executed lease.

(4) For purposes of providing proof of employment, the individual may provide an Internal Revenue Service Form W-2, a pay check, or a notarized verification of employment from the individual's employer, or other documentation evidencing employment. Such employment documentation shall evidence the location in which such individual actually carries out or performs the functions of his or her job.

(5) Documentation provided pursuant to this subsection may be required to be date specific, depending upon the individual's exemption claim.

(g) Any individual who knowingly violates this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years.

(h) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under Code Section 42-1-12. (Code 1981, § 42-1-16, enacted by Ga. L. 2010, p. 168, § 14/HB 571.)

42-1-17. Definitions; residency restrictions for sexual offenders; penalties.

(a) As used in this Code section, the term:

(1) "Area where minors congregate" shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18 years of age.

(2) "Child care facility" means all public and private pre-kindergarten facilities, child care learning centers, and preschool facilities.

(3) "Individual" means a person who is required to register pursuant to Code Section 42-1-12.

(4) "Lease" means a right of occupancy pursuant to a written and valid lease or rental agreement.

(5) "Minor" means any person who is under 18 years of age.

(b) Any individual who committed an act between June 4, 2003, and June 30, 2006, for which such individual is required to register shall not reside within 1,000 feet of any child care facility, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides

to the outer boundary of the property of the child care facility, school, or area where minors congregate at their closest points.

(c)(1) If an individual owns or leases real property and resides on such property and a child care facility, school, or area where minors congregate thereafter locates itself within 1,000 feet of such property, such individual shall not be guilty of a violation of subsection (b) of this Code section if such individual successfully complies with subsection (d) of this Code section.

(2) An individual owning or leasing real property and residing on such property within 1,000 feet of a prohibited location, as specified in subsection (b) of this Code section, shall not be guilty of a violation of this Code section if such individual had established such property ownership or leasehold prior to June 4, 2003, and such individual successfully complies with subsection (d) of this Code section.

(d)(1) If an individual is notified that he or she is in violation of subsection (b) of this Code section, and if such individual claims that he or she is exempt from such prohibition pursuant to subsection (c) of this Code section, such individual shall provide sufficient proof demonstrating his or her exemption to the sheriff of the county where the individual is registered within ten days of being notified of any such violation.

(2) For purposes of providing proof of residence, the individual may provide a driver's license, government issued identification, or any other documentation evidencing where the individual's habitation is fixed. For purposes of providing proof of property ownership, the individual shall provide a copy of his or her warranty deed, quitclaim deed, or voluntary deed, or other documentation evidencing property ownership.

(3) For purposes of providing proof of a leasehold, the individual shall provide a copy of the applicable lease agreement. Leasehold exemptions shall only be for the duration of the executed lease.

(4) Documentation provided pursuant to this subsection may be required to be date specific, depending upon the individual's exemption claim.

(e) Any individual who knowingly violates this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than three years.

(f) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under

Code Section 42-1-12. (Code 1981, § 42-1-17, enacted by Ga. L. 2010, p. 168, § 14/HB 571; Ga. L. 2013, p. 135, § 12/HB 354.)

The 2013 amendment, effective July 1, 2013, substituted “child care learning centers” for “day-care centers” near the end of paragraph (a)(2).

42-1-18. “Photograph” defined; photographing minor without consent of parent or guardian prohibited; penalty.

(a) As used in this Code section, the term “photograph” means to take any picture, film or digital photograph, motion picture film, videotape, or similar visual representation or image of a person.

(b) No person required to register as a sexual offender pursuant to Code Section 42-1-12 shall intentionally photograph a minor without the consent of the minor’s parent or guardian.

(c) Any person who knowingly violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 42-1-18, enacted by Ga. L. 2010, p. 168, § 14/HB 571; Ga. L. 2011, p. 505, § 1/HB 162.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Any misdemeanor offenses arising under subsection (b) of O.C.G.A. § 42-1-18 are offenses for which those charged are to be fingerprinted. 2010 Op. Att’y Gen. No. 10-6.

42-1-19. Petition for release from registration requirements.

(a) An individual required to register pursuant to Code Section 42-1-12 may petition a superior court for release from registration requirements and from any residency or employment restrictions of this article if the individual:

(1) Has completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12; and

(A) Is confined to a hospice facility, skilled nursing home, residential care facility for the elderly, or nursing home;

(B) Is totally and permanently disabled as such term is defined in Code Section 49-4-80; or

(C) Is otherwise seriously physically incapacitated due to illness or injury;

(2) Was sentenced for a crime that became punishable as a misdemeanor on or after July 1, 2006, and meets the criteria set forth

in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2;

(3) Is required to register solely because he or she was convicted of kidnapping or false imprisonment involving a minor and such offense did not involve a sexual offense against such minor or an attempt to commit a sexual offense against such minor. For purposes of this paragraph, the term "sexual offense" means any offense listed in division (a)(10)(B)(i) or (a)(10)(B)(iv) through (a)(10)(B)(xix) of Code Section 42-1-12; or

(4) Has completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12 and meets the criteria set forth in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2.

(b)(1) A petition for release pursuant to this Code section shall be filed in the superior court of the jurisdiction in which the individual was convicted; provided, however, that if the individual was not convicted in this state, such petition shall be filed in the superior court of the county where the individual resides.

(2) Such petition shall be served on the district attorney of the jurisdiction where the petition is filed, the sheriff of the county where the petition is filed, and the sheriff of the county where the individual resides. Service on the district attorney and sheriff may be had by mailing a copy of the petition with a proper certificate of service.

(3) If a petition for release is denied, another petition for release shall not be filed within a period of two years from the date of the final order on a previous petition.

(c)(1) An individual who meets the requirements of paragraph (1), (2), or (3) of subsection (a) of this Code section shall be considered for release from registration requirements and from residency or employment restrictions.

(2) An individual who meets the requirements of paragraph (4) of subsection (a) of this Code section may be considered for release from registration requirements and from residency or employment restrictions only if:

(A) Ten years have elapsed since the individual completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12; or

(B) The individual has been classified by the board as a Level I risk assessment classification, provided that if the board has not done a risk assessment classification for such individual, the court shall order such classification to be completed prior to considering the petition for release.

(d) In considering a petition pursuant to this Code section, the court may consider:

- (1) Any evidence introduced by the petitioner;
- (2) Any evidence introduced by the district attorney or sheriff; and
- (3) Any other relevant evidence.

(e) The court shall hold a hearing on the petition if requested by the petitioner.

(f) The court may issue an order releasing the individual from registration requirements or residency or employment restrictions, in whole or part, if the court finds by a preponderance of the evidence that the individual does not pose a substantial risk of perpetrating any future dangerous sexual offense. The court may release an individual from such requirements or restrictions for a specific period of time. The court shall send a copy of any order releasing an individual from any requirements or restrictions to the sheriff and the district attorney of the jurisdiction where the petition is filed, to the sheriff of the county where the individual resides, to the Department of Corrections, and to the Georgia Bureau of Investigation. (Code 1981, § 42-1-19, enacted by Ga. L. 2010, p. 168, § 15/HB 571.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state sex offender registration statutes concerning level of classification — Claims for downward departure, 66 ALR6th 1.

CHAPTER 2

BOARD AND DEPARTMENT OF CORRECTIONS

Sec.		Sec.	
42-2-1.	Creation.		sonnel; establishment and maintenance of roster of employees.
42-2-2.	Board members, officers, records, and compensation.		
42-2-3.	Board meetings.	42-2-10.	Office of board, commissioner, and staff.
42-2-4.	Department created.	42-2-11.	Powers and duties of board; adoption of rules and regulations.
42-2-5.	Administrative functions of department.	42-2-12.	Reasonableness of rules and regulations.
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42-2-5.2.	Educational programs for adult offenders; awarding of Program and Treatment Completion Certificate.	42-2-14.	Power of Governor to declare state of emergency with regard to jail and prison overcrowding.
42-2-6.	Office of commissioner created; general duties; appointment; compensation.	42-2-15.	Employee benefit fund.
42-2-7.	Duties of commissioner relating to department retirements.	42-2-16.	Retaining department issued weapons.
42-2-8.	Additional duties of commissioner.		
42-2-9.	Selection of department per-		

Editor's notes. — Ga. L. 1985, p. 283, § 1 changed the name of the Department of Offender Rehabilitation, the Board of Offender Rehabilitation, and the commissioner of offender rehabilitation to the Department of Corrections, the Board of Corrections, and the commissioner of corrections, respectively, and amended sections throughout the Code to conform to the change. Section 2 of that Act, not codified by the General Assembly, pro-

vided as follows: "For administrative convenience, equipment and supplies bearing the name Board of Offender Rehabilitation, Department of Offender Rehabilitation, or commissioner of offender rehabilitation may be used by the Board of Corrections, Department of Corrections, or commissioner of corrections as if such equipment or supplies bore the name Board of Corrections, Department of Corrections, or commissioner of corrections."

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 20, 21.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 12-16.

42-2-1. Creation.

There is created the Department of Corrections. (Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 2012, p. 899, § 7-3/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted the present provisions of this Code section for the former provisions, which read: “As used in this chapter, the term:

“(1) ‘Board’ means the Board of Corrections.

“(2) ‘Commissioner’ means the commissioner of corrections.

“(3) ‘Department’ means the Department of Corrections.” See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall

apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For article, “The Chevron Two-Step in Georgia’s Administrative Law,” see 46 Ga. L. Rev. 871 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Cited in *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004); *Gay v. Owens*, 292 Ga. 480, 738 S.E.2d 614 (2013).

42-2-2. Board members, officers, records, and compensation.

(a) On and after July 1, 1983, the board shall consist of one member from each congressional district in the state and five additional members from the state at large. All members shall be appointed by the Governor, subject to confirmation by the Senate. The initial terms of members shall be as follows: two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1984; two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1985; two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1986; two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1987; and two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1988. Thereafter, all members appointed to the board by the Governor shall be appointed for terms of five years and until their successors are appointed and qualified. In the event of a vacancy during the term of any member by reason of death, resignation, or otherwise, the appointment of a successor by the Governor shall be for the remainder of the unexpired term of such member.

(b) The first members appointed under this Code section shall be appointed for terms which begin July 1, 1983. The members of the board serving on April 1, 1983, shall remain in office until their successors are appointed and qualified.

(c) The board shall annually elect one of its members as chairman and shall elect from its membership a secretary of the board. The secretary of the board shall keep adequate records and minutes of all business and official acts of the board. Records of the board shall be maintained in the office of the commissioner.

(d) Each member of the Board of Corrections shall receive the sum provided for by Code Section 45-7-21 for each day of actual attendance at meetings of the board and for each day of travel as a member of a committee of the board. In addition, upon recommendation by the chairman or the board, each member shall receive for out-of-state travel actual expenses incurred in connection therewith and reimbursement for actual transportation costs while traveling by public carrier or the legal mileage rate for the use of a personal automobile in connection with such attendance. Such sums, expenses, and costs shall be paid from funds appropriated or otherwise available to the Department of Corrections. (Ga. L. 1956, p. 161, § 8; Ga. L. 1983, p. 507, § 2; Ga. L. 1984, p. 22, § 42; Ga. L. 1986, p. 179, § 1.)

Editor's notes. — Ga. L. 1983, p. 507, § 1, not codified by the General Assembly, provides as follows: "It is the intent of this Act to implement certain changes re-

quired by Article III, Section VI, Paragraph IV, subparagraph (b) of the Constitution of the State of Georgia."

42-2-3. Board meetings.

The board shall meet once each month in the office of the commissioner, unless in the discretion of a majority of the board it is necessary or convenient to meet elsewhere to carry out the duties of the board. Special meetings may be held at such times and places as shall be specified by the call of the chairman of the board or by the commissioner. The secretary of the board shall give written notice of the time and place of all meetings of the board to each member of the board and to the commissioner. Meetings of the board shall be open to the public. However, the board may hold executive sessions pursuant to Chapter 14 of Title 50 whenever it, in its discretion, deems advisable. A majority of the board shall constitute a quorum for the transaction of business. (Ga. L. 1956, p. 161, § 7; Ga. L. 1987, p. 457, § 1; Ga. L. 2002, p. 1426, § 1.)

42-2-4. Department created.

There is created the Department of Corrections. (Ga. L. 1972, p. 1069, § 9; Ga. L. 1985, p. 283, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Liability for probationers' injuries. — Neither the state, and particularly the Department of Offender Rehabilitation (Corrections) and its employees in their official capacities, may incur liability as a result of a probationer injured while performing court-ordered community service work except to the extent permitted by O.C.G.A. § 28-5-85. 1983 Op. Att'y Gen. No. 83-18.

Department of Offender Rehabilitation (Corrections) employees, authorized by

law to supervise probationers while the probationers are performing approved court-ordered tasks under O.C.G.A. §§ 42-8-71, 42-8-72, and 42-8-73 are performing a governmental function as opposed to a ministerial task, and therefore will not be personally liable for injuries to the probationers sustained while performing the tasks unless the employees' conduct is willful and wanton. 1983 Op. Att'y Gen. No. 83-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 20.

42-2-5. Administrative functions of department.

(a) The department shall administer the state's correctional institutions and the rehabilitative programs conducted therein.

(b) The department shall provide The Council of Superior Court Clerks of Georgia the data set forth in Code Section 15-12-40.1, without charge and in the electronic format requested. (Ga. L. 1972, p. 1069, § 15; Ga. L. 1978, p. 1647, § 4; Ga. L. 2014, p. 451, § 13/HB 776.)

The 2014 amendment, effective July 1, 2014, designated the existing provisions as subsection (a) and added subsection (b).

Administrative rules and regula-

tions. — Organization, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Administration, Chapter 125-1-1.

JUDICIAL DECISIONS

DOC was immune from suit for negligence of county employees in handling state prisoner. — County that housed state inmates in the county's prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, et seq.; there-

fore, the State Department of Corrections was entitled to be dismissed from the inmate's suit based on sovereign immunity. Ga. Dep't of Corr. v. James, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

Cited in Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Collection of child support payments. — Department of Offender Rehabilitation (Corrections) should collect

child support payments for individuals between the ages of 18 and 21 when such payments arise out of court orders in

existence prior to July 1, 1972. 1972 Op.
Att'y Gen. No. U72-40.

42-2-5.1. Special school district for school age youth.

(a) In order to provide education for any school age youths incarcerated within any facility of the department, the department shall be considered a special school district which shall be given the same funding consideration for federal funds that school districts within the state are given. The special school district under the department shall have the powers, privileges, and authority exercised or capable of exercise by any other school district. The schools within the special school district shall be under the control of the commissioner, who shall serve as the superintendent of schools for such district. The board shall serve as the board of education for such district. The board, acting alone or in cooperation with the State Board of Education, shall establish education standards for the district. As far as is practicable, such standards shall adhere to the standards adopted by the State Board of Education for the education of school age youth, while taking into account:

(1) The overriding security needs of correctional institutions and other restrictions inherent to the nature of correctional facilities;

(2) The effect of limited funding on the capability of the department to meet certain school standards; and

(3) Existing juvenile education standards of the Correctional Education Association and the American Correctional Association, which shall be given primary consideration where any conflicts arise.

(b) The effect of subsection (a) of this Code section shall not be to provide state funds to the special school district under the department through Part 4 of Article 6 of Chapter 2 of Title 20. (Code 1981, § 42-2-5.1, enacted by Ga. L. 1995, p. 357, § 1; Ga. L. 2011, p. 632, § 3/HB 49; Ga. L. 2014, p. 34, § 1-6/SB 365.)

The 2014 amendment, effective July 1, 2014, substituted "department" for "Department of Corrections" in the first sentence of subsection (a) and in paragraph (a)(2); substituted "board" for "Board of

Corrections" in the fourth sentence of subsection (a); and redesignated former subsection (c) as present subsection (a) of Code Section 42-2-5.2.

42-2-5.2. Educational programs for adult offenders; awarding of Program and Treatment Completion Certificate.

(a) The board, acting alone or in cooperation with the State Board of the Technical College System of Georgia or other relevant education agencies, shall provide overall direction of educational programs for adult offenders in the correctional system and shall exercise program

approval authority. The board may enter into written agreements with other educational organizations and agencies in order to provide adult offenders with such education and employment skills most likely to encourage gainful employment and discourage return to criminal activity upon release. The board may also enter into agreements with other educational organizations and agencies to attain program certification for its vocational and technical education programs.

(b) The board shall develop and implement programs to assist adult offenders with reentry into society upon release from prison. In addition to educational and vocational programs, reentry programs may include social and behavioral programs, substance abuse counseling, mentoring programs, financial planning, physical and mental health programs, and housing and federal assistance programs.

(c) The board shall create a Program and Treatment Completion Certificate that may be issued to offenders under the rules and regulations of the board. Such certificate shall symbolize an offender's achievements toward successful reentry into society. The board's rules and regulations relating to the issuance of such certificate shall take into account an offender's disciplinary record and any other factor the board deems relevant to an individual's qualification for such certificate. The board's rules and regulations shall specify eligibility considerations and requirements for completion of such certificate. An offender who was convicted of a serious violent felony, as such term is defined in Code Section 17-10-6.1, shall not be eligible for such certificate.

(d) Nothing in this Code section shall be construed to constitute a waiver of the sovereign immunity of the state, and no action shall be maintained against the state or any agency or department thereof for issuance of or failure to issue any Program and Treatment Completion Certificate. (Code 1981, § 42-2-5.2, enacted by Ga. L. 2014, p. 34, § 1-6/SB 365.)

Effective date. — This Code section became effective July 1, 2014. issuance of Program and Treatment Completion Certificate, § 51-1-54.

Cross references. — Presumptions in

42-2-6. Office of commissioner created; general duties; appointment; compensation.

(a) There is created the position of commissioner of corrections. The commissioner shall be the chief administrative officer of the department. Subject to the general policy established by the board, the commissioner shall supervise, direct, account for, organize, plan, administer, and execute the functions vested in the department by this title.

(b) The commissioner shall be appointed by and shall serve at the pleasure of the board. Beginning July 1, 1999, the salary of the commissioner shall be set by the Governor and the expenses and allowances of the commissioner shall be as set by statute. (Ga. L. 1972, p. 1069, § 11; Ga. L. 1978, p. 1647, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1999, p. 910, § 2; Ga. L. 1999, p. 1213, § 3.)

JUDICIAL DECISIONS

Cited in *Busbee v. Reserve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978); *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Duty to maintain records of tort actions. — Commissioner of offender rehabilitation (corrections) should maintain any records related to possible tort action for at least two years after a possible tort occurs. 1972 Op. Att'y Gen. No. 72-75.

Penal institution in Georgia is any facility used to punish criminal offenders. 1980 Op. Att'y Gen. No. 80-121.

Designation of places for carrying out execution. — Present law limits the place of execution only to penal institutions other than the old prison farm in Baldwin County. The commissioner is authorized to designate any such penal institution as the place for carrying out an execution. 1980 Op. Att'y Gen. No. 80-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 20. 63A Am. Jur. 2d, Public Officers and Employees, §§ 26, 93 et seq., 223, 298 et seq., 431 et seq., 448 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 318, 322-326.

42-2-7. Duties of commissioner relating to department retirements.

The commissioner shall act for the department for and in compliance to any retirement provisions for the employees and officials of the department. (Ga. L. 1961, p. 124, § 1.)

42-2-8. Additional duties of commissioner.

(a) The commissioner shall direct and supervise all the administrative activities of the board and shall attend all meetings of the board. The commissioner shall also make, publish in print or electronically, and furnish to the General Assembly and to the Governor annual reports regarding the work of the board, along with such special reports as he or she may consider helpful in the administration of the penal system or as may be directed by the board. The commissioner shall perform such other duties and functions as are necessary or desirable to

carry out the intent of this chapter and which he or she may be directed to perform by the board.

(b) The commissioner or the commissioner's designee shall be authorized to make and execute contracts and all other instruments necessary or convenient for the acquisition of professional and personal employment services and for the leasing of real property. Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities and to designate any person or organization with whom the commissioner contracts as a law enforcement unit under paragraph (7) of Code Section 35-8-2.

(c) The commissioner shall be authorized to issue a warrant for the arrest of an offender who has escaped from the custody of the department upon probable cause to believe the offender has violated Code Section 16-10-52, relating to escape from lawful confinement. (Ga. L. 1956, p. 161, § 9; Ga. L. 1958, p. 413, § 1; Ga. L. 1962, p. 689, § 1; Ga. L. 1966, p. 121, § 1; Ga. L. 1988, p. 1448, § 1; Ga. L. 1996, p. 691, § 1; Ga. L. 2007, p. 224, § 1/HB 313; Ga. L. 2010, p. 838, § 10/SB 388.)

JUDICIAL DECISIONS

Cited in *State v. MacDougall*, 139 Ga. App. 815, 229 S.E.2d 667 (1976); *Busbee v. Reserve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Determination of mental disease and transfer to mental hospital. — This section, and Ga. L. 1956, p. 161, §§ 9, 10, 11, and 14 (see now O.C.G.A. §§ 42-2-8, 42-2-9, 42-2-11, and 42-2-52) indicate that the director (now commis-

sioner) of corrections was authorized to determine whether or not an inmate was mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att'y Gen. No. 68-136.

42-2-9. Selection of department personnel; establishment and maintenance of roster of employees.

The commissioner is authorized to appoint and employ such clerical force as is necessary to carry on the administration of the penal system. He may also employ such experts and technical help as are needed, along with assistants to the commissioner, wardens, superintendents, guards, and other employees necessary for the operation of the state operated institutions where inmates are confined. The commissioner shall establish and maintain in his office a complete roster of all employees in his office and in each of the various institutions operating

under the authority of the board. (Ga. L. 1956, p. 161, § 10; Ga. L. 1984, p. 940, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Determination of mental disease and transfer to mental hospital. — Ga. L. 1956, p. 161, §§ 9, 10, 11, and 14 (see now O.C.G.A. §§ 42-2-8, 42-2-9, 42-2-11, and 42-5-52) indicate that the director (now commissioner) of corrections was authorized to determine whether or not an inmate was mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att’y Gen. No. 68-136.

Wardens are employees of state or counties. — Law provides for two types of wardens: those at “state-operated institutions” under Ga. L. 1956, p. 161, § 10 (see now O.C.G.A. § 42-2-9), and those “appointed by the governing authority of the county” under Ga. L. 1956, p. 161, § 18 (see now O.C.G.A. § 42-5-30); a person cannot be a warden within the state penal system unless the warden is an employee either of the state or a county authorized to maintain a county correc-

tional institution under the supervision of the Board of Corrections. 1973 Op. Att’y Gen. No. 73-72.

Duty of selecting and employing wardens is vested exclusively in Board of Corrections and the director (now commissioner) thereof; the board and the board’s director (now commissioner) are to exercise their informed and expert judgment in selecting and discharging such officials, and any contract or agreement whereby they seek to divest themselves of that discretion, power, and judgment is void as being contrary to public policy. 1958-59 Op. Att’y Gen. p. 241.

Supplementing employee salaries. — Department of Offender Rehabilitation (Corrections) may supplement salaries of teachers at Georgia Industrial Institute who are provided by the local board of education. 1962 Op. Att’y Gen. p. 162.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 13, 115.

42-2-10. Office of board, commissioner, and staff.

The executive office of the board and the commissioner shall be located in the City of Atlanta, and suitable quarters shall be assigned to the board and the commissioner and to his staff of employees. (Ga. L. 1956, p. 161, § 27.)

JUDICIAL DECISIONS

Cited in *Busbee v. Reserve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978).

42-2-11. Powers and duties of board; adoption of rules and regulations.

(a) The board shall establish the general policy to be followed by the department and shall have the duties, powers, authority, and jurisdiction provided for in this title or as otherwise provided by law.

(b) The board is authorized to adopt, establish, and promulgate rules and regulations governing the transaction of the business of the penal system of the state by the department and the commissioner and the administration of the affairs of the penal system in the different penal institutions coming under its authority and supervision and shall make the institutions as self-supporting as possible.

(c)(1) The board shall adopt rules governing the assignment, housing, working, feeding, clothing, treatment, discipline, rehabilitation, training, and hospitalization of all inmates coming under its custody.

(2)(A) As used in this paragraph, the term:

(i) "Evidence based practices" means supervision policies, procedures, programs, and practices that scientific research demonstrates reduce recidivism among individuals who are under some form of correctional supervision.

(ii) "Recidivism" means returning to prison or jail within three years of being placed on probation or being discharged or released from a department or jail facility.

(B) The board shall adopt rules and regulations governing the management and treatment of inmates and probationers to ensure that evidence based practices, including the use of a risk and needs assessment and any other method the board deems appropriate, guide decisions related to preparing inmates for release into the community and managing probationers in the community. The board shall require the department to collect and analyze data and performance outcomes relevant to the level and type of treatment given to an inmate or probationer and the outcome of the treatment on his or her recidivism and prepare an annual report regarding such information which shall be submitted to the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, and the chairpersons of the House Committee on State Properties and the Senate State Institutions and Property Committee.

(d) The board shall also adopt rules and regulations governing the conduct and the welfare of the employees of the state institutions operating under its authority and of the county correctional institutions and correctional facilities or programs operating under its supervision. It shall prescribe the working hours and conditions of work for employees in the office of the commissioner and in institutions operating under the authority of the board.

(e) The board shall also adopt rules and regulations governing the negotiation and execution of any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to

the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities.

(f) The board shall adopt rules:

(1) Providing for the transfer to a higher security facility of each inmate who commits battery or aggravated assault against a correctional officer while in custody; provided, however, that this provision shall not apply in instances where the inmate is already incarcerated in a maximum security facility; and

(2) Specifying the procedures for offering department assistance to employees who are victims of battery or aggravated assault by inmates in filing criminal charges or civil actions against their assailants, including procedures for posting notices that such assistance is available to any employee who is subjected to battery or aggravated assault by an inmate, but not including legal representation of such employees.

(g) All rules and regulations adopted pursuant to this Code section shall be adopted, established, promulgated, amended, repealed, filed, and published in accordance with the applicable provisions and procedure as set forth in Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” The courts shall take judicial notice of any such rules or regulations.

(h) As used in this Code section, the words “rules and regulations” shall have the same meaning as the word “rule” is defined in paragraph (6) of Code Section 50-13-2.

(i) The board shall have the authority to request bids and proposals and to enter into contracts for the operation of probation detention centers by private companies and entities for the confinement of probationers under Code Section 42-8-35.4 and probation diversion centers for the confinement of probationers under Code Section 42-8-35.5. The board shall have the authority to adopt, establish, and promulgate rules and regulations for the operation of probation detention and probation diversion centers by private companies and entities. (Ga. L. 1956, p. 161, § 11; Ga. L. 1969, p. 598, § 1; Ga. L. 1978, p. 1647, § 1; Ga. L. 1983, p. 3, §§ 31, 60; Ga. L. 1983, p. 507, § 3; Ga. L. 1996, p. 691, § 2; Ga. L. 1996, p. 726, § 1; Ga. L. 2006, p. 727, § 1/SB 44; Ga. L. 2012, p. 899, § 7-4/HB 1176; Ga. L. 2013, p. 141, § 42/HB 79.)

The 2012 amendment, effective July 1, 2012, designated the existing provisions of subsection (c) as paragraph (c)(1) and added paragraph (c)(2). See editor’s note for applicability.

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modern-

ize, and correct the Code, substituted “House Committee on State Properties” for “House Committee on State Institutions and Property” near the end of the last sentence of subparagraph (c)(2)(B).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, subsection

(g) as enacted by Ga. L. 1996, p. 726, § 1, was redesignated as subsection (f) and subsections (f) and (g) as enacted by Ga. L. 1996, 691, § 2, were redesignated as subsections (g) and (h), respectively.

Editor's notes. — Ga. L. 1983, p. 507, § 1, not codified by the General Assembly, provides as follows: "It is the intent of this Act to implement certain changes required by Article III, Section VI, Paragraph IV, subparagraph (b) of the Constitution of the State of Georgia."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012,

shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974). For review of 1996 department of corrections legislation, see 13 Ga. St. U.L. Rev. 253 (1996).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, §§ 77-307, 77-311, and 77-313 are included in the annotations for this Code section.

Authority for rules regarding drug testing. — Rule authorizing the warden to "direct and manage" employees does not encompass the authority to order employees to submit to random drug testing. Any rule regarding drug testing of the employees of a penal institution operating under the authority of the Board of Corrections must be promulgated by the board rather than by the warden of the institution. *Department of Cors. v. Colbert*, 260 Ga. 255, 391 S.E.2d 759 (1990).

Safety and health of inmates. — Corrections department has a nondelegable duty to protect the safety and health of state inmates that cannot be relieved by employing independent contractors. *Williams v. Georgia Dep't of Cors.*, 224 Ga. App. 571, 481 S.E.2d 272 (1997).

Liability of warden for torts of inmates. — Warden of a public works camp (now county correctional institution) will not be held liable for torts of convicts on mere averment that the warden was negligent "in permitting said convicts to roam the roads of this county and state in a truck, without any guard," whereby injuries resulted from a collision of the truck

with the plaintiff's car as it was discretionary with the warden to determine how and in what manner convicts employed outside the confines of the camp (now county correctional institution) doing work in connection with its operation should be suffered to go at large, and wardens acting in a discretionary capacity will not be liable unless guilty of willfulness, fraud, malice, or corruption, or unless the warden knowingly act wrongfully, and not according to the warden's honest convictions of duty. *Price v. Owen*, 67 Ga. App. 58, 19 S.E.2d 529 (1942) (decided under former Code 1933, §§ 77-307, 77-311, and 77-313 prior to revision by Ga. L. 1956, p. 101).

Procedure for inmate to contest rules as to treatment. — Complaint by an inmate of the invalidity of one or more of the department's rules, or for failure to apply and abide by one or more of the department's rules, or for violation of one or more of the department's rules, with respect to treatment, discipline, or conditions of confinement of the inmate must be asserted in an action against the director of the department of corrections (now commissioner of corrections), and such action must assert that administrative procedures provided by the department for the correction of such alleged complaints have been exhausted prior to the filing of the action. *Brown v. Caldwell*, 231 Ga. 795, 204 S.E.2d 137 (1974).

Rules on lethal injections not “treatment.” — Contrary to the inmate’s claim, the Board of Corrections did not have a duty under the mandatory rulemaking provision of O.C.G.A. § 42-2-11(c)(1), regarding the “treatment” of inmates, to make rules governing lethal injections because “treatment” referred to medical care and lethal injections did not constitute the practice of medicine. *Hill v. Owens*, 292 Ga. 380, 738 S.E.2d 56 (2013).

Supervision of prisoners discretionary function. — Supervision of a prisoner work detail is a discretionary function by virtue of which the supervisor is entitled to official immunity. *Parrish v. State*, 270 Ga. 878, 514 S.E.2d 834 (1999), reversing *Simmons v. Coweta County*, 229 Ga. App. 550, 494 S.E.2d 362 (1997).

DOC was immune from suit for negligence of county employees in handling state prisoner. — County that housed state inmates in the county’s prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for

which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, et seq.; therefore, the State Department of Corrections was entitled to be dismissed from the inmate’s suit based on sovereign immunity. *Ga. Dep’t of Corr. v. James*, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

Injunctions against Board of Commissioners. — Injunction will not lie against the prison commissioners (now Board of Corrections) when an injunction interferes with the commissioners’ duties. *Southern Mining Co. v. Lowe*, 105 Ga. 352, 31 S.E. 191 (1898) (decided under former law).

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *Patterson v. MacDougall*, 506 F.2d 1 (5th Cir. 1975); *Conklin v. Zant*, 202 Ga. App. 528, 414 S.E.2d 741 (1992).

OPINIONS OF THE ATTORNEY GENERAL

Applicability to “state prisoners.” — Ga. L. 1956, p. 161, §§ 11 and 23 (see now O.C.G.A. §§ 42-2-11 and 42-5-57) relate to “state prisoners,” rather than “county prisoners”; the distinction between “state” and “county” prisoners continues in effect even though both may be confined in a county work camp (now county correctional institution). 1970 Op. Att’y Gen. No. U70-134.

Use of profits generated in penal or correctional institution store. — Board of Corrections can use the profits generated in a prison store to offset the expense of employing an athletic director to direct the athletic activities of inmates, by withdrawing such sums from the prison athletic fund and depositing the same in the treasury of the Board of Corrections. 1969 Op. Att’y Gen. No. 69-314.

Board authorized to develop service-type industrial programs. — Board of Corrections is authorized to develop service-type industrial programs such as furniture refinishing, but such programs may not be developed by the

Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1970 Op. Att’y Gen. No. 70-156.

Prison may farm county property and share crop with county. — Board of Corrections may enter into an agreement with a county whereby the county gives the prison a crop allotment and allows the prison to farm county property, furnishing the fertilizer and equipment for gathering the crop, and in return for which the county is to receive a portion of the crop grown on the property, with the remainder to be consumed within the prison branch. 1970 Op. Att’y Gen. No. 70-83.

Determination of mental disease and transfer to mental hospital. — Ga. L. 1956, p. 161, §§ 9, 10, 11 and 14 (see now O.C.G.A. §§ 42-2-8, 42-2-9, 42-2-11, and 42-5-52) indicate that the director (now commissioner) of corrections was authorized to determine whether or not an inmate was mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att’y Gen. No. 68-136.

RESEARCH REFERENCES

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, §§ 161-170, 182, 195, 196.

42-2-12. Reasonableness of rules and regulations.

All rules and regulations enacted by the board under the authority of this chapter must be reasonable. (Ga. L. 1956, p. 161, § 12.)

JUDICIAL DECISIONS

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *Brown v. Caldwell*, 231 Ga. 795, 204 S.E.2d 137 (1974); *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997).

RESEARCH REFERENCES

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, §§ 171 et seq.

ALR. — Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

42-2-13. Grants to municipal corporations and counties for local jails and correctional institutions.

(a) The commissioner may make grants of funds to municipal corporations and counties for establishing, constructing, and operating local jails and correctional institutions. Any such grant shall be in addition to, and not in lieu of, state payments made pursuant to Code Section 42-5-51 and Code Section 42-5-53. The commissioner shall make such grants where the recipient, sum, and purpose have been specified by appropriation. From funds generally available for such grants, but when such funds are available without specification other than general purpose, the commissioner shall allocate such funds according to criteria established by the commissioner, including, but not limited to, overpopulation, innovativeness, efficiency, multigovernment involvement, and readiness.

(b) Pursuant to Article VII, Section III, Paragraph III of the Constitution and as otherwise may be authorized, all grants similar to grants provided for in subsection (a) of this Code section made by the department before March 15, 1988, are ratified, confirmed, and approved. (Code 1981, § 42-2-13, enacted by Ga. L. 1988, p. 256, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 1990, p. 8, § 42.)

42-2-14. Power of Governor to declare state of emergency with regard to jail and prison overcrowding.

The Governor, upon certification by the commissioner of corrections and approval by the director of the Office of Planning and Budget that the population of the prison system of the State of Georgia has exceeded the capacity of the prison system for any period of 90 consecutive days, beginning at any time after December 31, 1988, may declare a state of emergency with regard to jail and prison overcrowding. Following the declaration of such emergency, the department may establish additional facilities for use by the department, such facilities to be either of a permanent type of construction or of a temporary or movable type as the department may find most advantageous to the particular needs, to the end that the inmates under its supervision may be so distributed throughout the state as to facilitate individualization of treatment designed to prepare them for lawful living in the community where they are most likely to reside after their release from a correctional facility. For this purpose, the department may purchase or lease sites and suitable lands and erect necessary buildings thereon or purchase or lease existing facilities, all within the limits of appropriations as approved by the General Assembly. With the approval of the Governor, provisions of Chapter 5 of Title 50, relating to the Department of Administrative Services, or provisions of Code Section 50-6-25 or Chapter 22 of Title 50, relating to control over acquisition of professional services, may be waived by the department to facilitate the rapid construction or procurement of facilities for inmates; provided, however, that the authority to waive provisions of Code Section 50-6-25 shall terminate as of July 1, 1991. During any year in which correctional facilities are constructed or procured under this Code section and any requirements are waived, the department shall furnish the Governor and the General Assembly with a detailed report specifying the facilities constructed or procured, the requirements waived, and the reasons therefor. (Code 1981, § 42-2-14, enacted by Ga. L. 1989, p. 57, § 1; Ga. L. 1990, p. 135, § 1; Ga. L. 2012, p. 775, § 42/HB 942.)

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, deleted “provisions, other than bonding requirements, of Chapter 3 of this title, known as the ‘Georgia Building Authority (Penal) Act,’”

preceding “provisions of Chapter 5” in the fourth sentence of this Code section.

Law reviews. — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).

42-2-15. Employee benefit fund.

(a) As used in this Code section, the term:

(1) "Employee" means a full-time or part-time employee of the department or an employee serving under contract with the department.

(2) "Employee benefit fund" means an account containing the facility's profits generated from vending services maintained by a local facility.

(3) "Executive director of the facility" means the warden, superintendent, chief probation official, or such other head of a facility.

(4) "Facility" means a prison, institution, detention center, diversion center, probation office, or such other similar property under the jurisdiction or operation of the department.

(5) "Vending services" means one or more vending machines in a location easily accessible by employees, which services may also be accessible by members of the general public, but which vending machines do not require a manager or attendant for the purpose of purchasing food or drink items. Vending services shall be for the provision of snack or food items or nonalcoholic beverages and shall not include any tobacco products or alcoholic beverages.

(b) It is the intent of the General Assembly to provide an employee benefit as set forth in this Code section which benefit shall be of de minimis cost to the state and which shall in turn benefit the state through the retention of dedicated and experienced employees.

(c) Any other provision of the law notwithstanding, a facility is authorized to purchase vending machines or enter into vending service agreements by contract, sublease, or license for the purpose of providing vending services to each facility under the jurisdiction of the department. Vending services shall be provided in any facility where the operation of such vending services is capable of generating a profit for that facility. The facility's profits generated from the vending services shall be maintained by the local facility under the authority of the executive director of the facility in an interest-bearing account and the account shall be designated the "employee benefit fund."

(d) The fund shall be administered by a committee of five representatives of the facility to be selected by the executive director of the facility. Funds from the account may be spent as determined by a majority vote of the committee. Funds may be expended on an individual employee of the facility for the purpose of recognizing a death, birth, marriage, or prolonged illness or to provide assistance in the event of a natural disaster or devastation adversely affecting an employee or an employee's immediate family member. Funds may also be expended on an item or activity which shall benefit all employees of the facility equally for the purposes of developing camaraderie or otherwise foster-

ing loyalty to the department or bringing together the employees of the facility for a meeting, training session, or similar gathering. Funds spent for an individual employee shall not exceed \$250.00 per person per event and funds expended for employee gatherings or items shall not exceed \$1,000.00 per event or single item; provided, however, that events conducted for the benefit of employees of an entire institution shall not exceed \$4,500.00 per event.

(e) The employee benefit fund account of each facility shall be reviewed and audited by the administrative office of the local facility and by the department in accordance with standards and procedures established by the department. No account shall maintain funds in excess of \$5,000.00. Any funds collected which cause the fund balance to exceed \$5,000.00 shall be remitted to the department's general operating budget.

(f) Nothing in this Code section shall prohibit a facility from purchasing vending machines or providing or maintaining vending services which do not generate a profit, provided that such services are of no cost to the department, nor shall this Code section be construed so as to prohibit a private provider of vending services from making or retaining a profit pursuant to any agreement for such services. (Code 1981, § 42-2-15, enacted by Ga. L. 2006, p. 332, § 1/HB 1318.)

42-2-16. Retaining department issued weapons.

(a) An employee leaving the service of the department under honorable conditions who has accumulated 20 or more years of service with the department as a certified officer shall be entitled as part of such employee's compensation to retain his or her department issued weapon.

(b) The board is authorized to promulgate rules and regulations for the implementation of this Code section. (Code 1981, § 42-2-16, enacted by Ga. L. 2013, p. 82, § 1/HB 482.)

Effective date. — This Code section became effective July 1, 2013.

CHAPTER 3

GEORGIA BUILDING AUTHORITY (PENAL)

42-3-1 through 42-3-32.

Reserved. Repealed by Ga. L. 2008, p. 224, § 3, effective July 1, 2008.

Editor's notes. — This chapter consisted of Code Sections 42-3-1 through 42-3-32, and was based on Ga. L. 1960, p. 892, §§ 2-30, 32; Ga. L. 1964, p. 91, §§ 1-3; Ga. L. 1965, p. 591, § 1; Ga. L. 1967, p. 810, § 1; Ga. L. 1967, p. 864, §§ 1-4; Ga. L. 1970, p. 552, § 1; Ga. L. 1972, p. 1015, § 419; Ga. L. 1982, p. 3, § 42; Ga. L. 1983, p. 3, § 60; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1988, p. 426, § 1; Ga. L. 1989, p. 415, § 1; Ga. L. 1991, p. 94, § 42.

CHAPTER 4

JAILS

Article 1

General Provisions

Sec.

- 42-4-1. Appointment of county and municipal jailers.
- 42-4-2. Oath and bond of jailers.
- 42-4-3. When coroner to act as keeper of jail.
- 42-4-4. Duties of sheriff as to jail inmates; designation of inmate as trusty; failure to comply with Code section.
- 42-4-5. Cruelty to inmates.
- 42-4-6. Confinement and care of tubercular inmates; crediting of time spent in hospital or institution against sentence.
- 42-4-7. Maintenance of inmate record by sheriff; earned time allowances.
- 42-4-8. Inquiry into contents of inmate record by grand jury; failure to comply with Code Section 42-4-7.
- 42-4-9. Conditions for receipt of federal prisoners.
- 42-4-10. Receipt of additional federal prisoners after initial acceptance.
- 42-4-11. Procedure for transfer of person in custody upon change of venue.
- 42-4-12. Penalty for refusal by officer to receive persons charged with or guilty of offense.
- 42-4-13. Possession of drugs, weapons, or alcohol by inmates.
- 42-4-14. "Illegal alien" defined; determination of nationality of person charged with felony and confined in a jail facility.
- 42-4-15. Limitations on medical charges for providing emergency medical care services to individuals in custody.

Article 2

Conditions of Detention

- 42-4-30. Definitions.

Sec.

- 42-4-31. Required safety and security measures.
- 42-4-32. Sanitation and health requirements generally; meals; inspections; medical treatment.
- 42-4-33. Penalty for violations of article.

Article 3

Medical Services for Inmates

- 42-4-50. Definitions.
- 42-4-51. Information as to inmate's health insurance or eligibility for benefits; access to medical services; liability for payment; inmate's liability for costs of medical care; procedure for recovery against inmate.

Article 4

Deductions from Inmate Accounts for Expenses

- 42-4-70. Definitions.
- 42-4-71. Deduction of costs from inmate's account for destruction of property, medical treatment, and other causes; exception for certain medical costs.

Article 5

Regional Jail Authorities

- 42-4-90. Short title.
- 42-4-91. Statement of authority; policy of state.
- 42-4-92. Definitions.
- 42-4-93. Creation of authorities; ordinance or resolution required; agreement; approval of sheriff; exemption from Georgia State Financing and Investment Commission Act.
- 42-4-94. Board of directors; members; election of officers; expenses; duties; addition of counties or municipalities to authority.
- 42-4-95. Management committee of county regional jail authority; management and operation of

Sec.		Sec.	
	municipal regional jail authority.	42-4-102.	Construction of article; bonds not subject to regulation under Georgia Uniform Securities Act; power of counties and municipalities to activate authorities.
42-4-96.	Quorums; voting requirements.	42-4-103.	Operation and finance agreement required; withdrawal from authority.
42-4-97.	Powers of authority.	42-4-104.	Authority of county or municipality to establish and maintain jail or jail-holding facility.
42-4-98.	Duties and responsibilities of sheriffs and governing bodies imposed upon management committee and authority.	42-4-105.	Immunity of authorities from liability.
42-4-99.	Limitation on liability of members, officers, or employees.		
42-4-100.	Bonds or other obligations; requirements and procedure for issuance.		
42-4-101.	Bonds or other obligations not indebtedness of state or political subdivision; payment.		

Cross references. — Standards relating to construction of county jails, § 36-9-9.

JUDICIAL DECISIONS

Court order that sheriff transfer prisoner to secure jail. — While it is beyond dispute that the sheriff, and not the superior court, is charged with administration of jails, when an issue is properly raised before the trial court regarding jail security or other matters of jail administration and evidence is presented on the

issue, the court is empowered to make a determination. Upon a determination that the jail is not secure, the trial court is authorized to order the sheriff to transfer a prisoner to the nearest county having a secure jail. In re Irvin, 254 Ga. 251, 328 S.E.2d 215 (1985).

RESEARCH REFERENCES

ALR. — Constitutional right of prisoners to abortion services and facilities — federal cases, 90 ALR Fed. 683.

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR. — Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

42-4-1. Appointment of county and municipal jailers.

(a) By virtue of their offices, sheriffs are jailers of the counties and have the authority to appoint other jailers, subject to the supervision of the county governing authority, as prescribed by law.

(b) By virtue of their offices, chiefs of police are the jailers of the municipal corporations and have the authority to appoint other jailers, subject to the supervision of the municipal governing authority, as prescribed by law. Each jailer of a municipal corporation shall maintain the records required of sheriffs by subsection (a) of Code Section 42-4-7. (Orig. Code 1863, § 331; Code 1868, § 392; Code 1873, § 356; Code 1882, § 356; Penal Code 1895, § 1120; Penal Code 1910, § 1149; Code 1933, § 77-101; Ga. L. 1988, p. 266, § 1.)

Cross references. — Sheriffs generally, T. 15, C. 16.

JUDICIAL DECISIONS

Liability of sheriff for prisoner's death. — After a prisoner has been placed in the custody of and accepted by a sheriff through the sheriff's deputy, the jailor of the county, and when the prisoner is drunk and as a result of the prisoner's drunkenness sets fire to himself and is burned to death, the sheriff and the sureties on the sheriff's official bond are not liable to the dependents of the deceased prisoner, upon the ground that the jailor was negligent in incarcerating the prisoner in a cell by alone without first searching the prisoner and removing from the prisoner's any object or article with which the prisoner might inflict injury upon

himself or others, such as matches, and on the ground that the jailor did not respond to the drunken cries of the prisoner for help. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

Sheriff of county has a statutory duty to accept all city prisoners and the county commissioners have authority to require the sheriff to do so. *Griffin v. Chatham County*, 244 Ga. 628, 261 S.E.2d 570 (1979).

Cited in *Chappell v. Kilgore*, 196 Ga. 591, 27 S.E.2d 89 (1943); *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

OPINIONS OF THE ATTORNEY GENERAL

Person arrested by a campus police officer for violation of a state criminal law should be incarcerated in the county jail as the sheriff is, by virtue of the sheriff's office, the county jailer; whether the accused is to be admitted to bail and the amount thereof are matters which are addressed to the commitment court. 1970 Op. Att'y Gen. No. 70-69.

No surcharge payment as condition to serving sentence. — Sheriff must accept into custody those individuals convicted of criminal offenses who have been sentenced to a term of incarceration, and the sheriff may not require payment of a surcharge as a condition precedent to service of the sentence. 1992 Op. Att'y Gen. No. U92-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 20, 21.
C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 12-14, 115. 80 C.J.S., Sheriffs and Constables, § 32.

42-4-2. Oath and bond of jailers.

Before commencing to carry out the duties of their office, jailers must give to the sheriff a bond and surety for the sum of \$1,000.00, conditioned for the faithful performance of their duties as jailers, and shall take and subscribe before the sheriff of their respective counties, to be filed in and entered into the records of the sheriff's office, the following oath:

"I do swear that I will well and truly do and perform, all and singular, the duties of jailer for the County of ____; and that I will humanely treat prisoners who may be brought to the jail of which I am keeper and not suffer them to escape by any negligence or inattention of mine. So help me God." (Laws 1811, Cobb's 1851 Digest, pp. 201, 202; Code 1863, § 332; Code 1868, § 393; Code 1873, § 357; Code 1882, § 357; Penal Code 1895, § 1121; Penal Code 1910, § 1150; Code 1933, § 77-102; Ga. L. 1987, p. 342, § 1.)

JUDICIAL DECISIONS

Duty of care sheriff owes prisoners. — Sheriff owes to a prisoner placed in the sheriff's custody a duty to keep the prisoner safely and free from harm, to render the prisoner medical aid when necessary, and to treat the prisoner humanely and refrain from oppressing the prisoner; and if a sheriff is negligent in the sheriff's care and custody of a prisoner, and as a result the prisoner receives injury or meets death, or where a sheriff fails in the performance of the sheriff's duty to the prisoner, and the latter suffers injury or meets death as a result of such failure, the sheriff would, in a proper case, be liable on the sheriff's official bond to the injured prisoner or to the prisoner's dependents. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

Liability of sheriff for prisoner's death. — When a prisoner has been placed in the custody of and accepted by a sheriff through the sheriff's deputy, the jailor of the county, and when the prisoner is drunk and as a result of drunkenness sets fire to himself and is burned to death,

the sheriff and the sureties on the sheriff's official bond are not liable to the dependents of the deceased prisoner, upon the ground that the jailor was negligent in incarcerating the prisoner in a cell alone without first searching the prisoner and removing from the prisoner's person any object or article with which the prisoner might inflict injury upon himself or others, such as matches, and on the ground that the jailor did not respond to the drunken cries of the prisoner for help. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

Sheriff's duty of safe confinement. — Custody of the defendant, pending the defendant's trial under an indictment for criminal offense, is in the sheriff of the county wherein the offense was committed, and the responsibility for the defendant's safe and secure confinement in jail is that of the sheriff. *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

Jailer did not obey oath. — Motion for general demurrer by the defendant, a county jailer, was properly denied on the

defendant's indictment on a charge of violating the defendant's oath of office for receiving marijuana as payment for delivering a pack of cigarettes to an inmate

because it could not be said that defendant had "well and truly" performed the defendant's duties. *Murkerson v. State*, 264 Ga. App. 701, 592 S.E.2d 184 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, § 487 et seq.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 126.

ALR. — Personal liability of policeman,

sheriff, or similar peace officer on his bond, for injury suffered as a result of failure to enforce law or arrest law-breaker, 41 ALR3d 700.

42-4-3. When coroner to act as keeper of jail.

The county coroner shall be keeper of the jail when the sheriff is imprisoned or absent from the county leaving no deputy. (Orig. Code 1863, § 564; Code 1868, § 628; Code 1873, § 587; Code 1882, § 587; Penal Code 1895, § 1122; Penal Code 1910, § 1151; Code 1933, § 77-105.)

Cross references. — Coroners generally, T. 45, C. 16.

RESEARCH REFERENCES

C.J.S. — 80 C.J.S., Sheriffs and Constables, §§ 31, 37.

42-4-4. Duties of sheriff as to jail inmates; designation of inmate as trusty; failure to comply with Code section.

(a) It shall be the duty of the sheriff:

(1) To take from the outgoing sheriff custody of the jail and the bodies of such persons as are confined therein, along with the warrant or cause of commitment;

(2) To furnish persons confined in the jail with medical aid, heat, and blankets, to be reimbursed if necessary from the county treasury, for neglect of which he shall be liable to suffer the penalty prescribed in this Code section; provided, however, that, with respect to an inmate covered under Article 3 of this chapter, the officer in charge will provide such person access to medical aid and may arrange for the person's health insurance carrier to pay the health care provider for the aid rendered; and

(3) To take all persons arrested or in execution under any criminal or civil process to the jail of an adjoining county, or to the jail of some other county if the latter is more accessible, if the jail of his county is

in an unsafe condition, under such rules as are prescribed in this chapter.

(b) Subject to the provisions of this subsection and except as provided by law or as directed by a court of competent jurisdiction, a sheriff shall not release a prisoner from his custody prior to the lawful completion of his sentence including any lawful credits under a trusty system. The provision shall not, however, preclude a sheriff from designating an inmate as a trusty and utilizing him in a lawful manner and, furthermore, this provision shall not preclude a sheriff from transferring a prisoner to another jail in another county if the sheriff concludes that such transfer is in the best interest of the prisoner or that such transfer is necessary for the orderly administration of the jail.

(c) Any sheriff or deputy who fails to comply with this Code section shall be fined for contempt, as is the clerk of the superior court in similar cases. The sheriff or deputy shall also be subject to removal from office as prescribed in Code Section 15-16-26. (Laws 1799, Cobb's 1851 Digest, p. 574; Laws 1810, Cobb's 1851 Digest, p. 577; Laws 1818, Cobb's 1851 Digest, p. 858; Laws 1820, Cobb's 1851 Digest, p. 480; Laws 1823, Cobb's 1851 Digest, p. 512; Code 1863, §§ 336, 340; Ga. L. 1865-66, p. 64, § 15; Code 1868, §§ 397, 401; Code 1873, §§ 361, 366; Code 1882, §§ 361, 366; Penal Code 1895, §§ 1127, 1128; Penal Code 1910, §§ 1156, 1157; Code 1933, §§ 77-110, 77-111; Ga. L. 1990, p. 1443, § 1; Ga. L. 1992, p. 2125, § 1; Ga. L. 2012, p. 173, § 2-10/HB 665.)

The 2012 amendment, effective July 1, 2012, substituted "Code Section 15-16-26" for "Code Section 15-6-82" at the end of the second sentence of subsection (c).

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 1990, "trusty" was substituted for "trustee" in the first sentence of subsection (b).

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992).

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Legislative intent. — O.C.G.A. § 42-4-4 was not intended to require that the availability of health insurance was a precondition to obtaining medical treatment for an inmate or that an inmate otherwise would be expected to pay for medical treatment received. *Cherokee County v. North Cobb Surgical Assocs.*, P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

Duty of care sheriff owes prisoners. — Sheriff owes to a prisoner placed in the sheriff's custody a duty to keep the prisoner safely and free from harm, to render to the prisoner medical aid when neces-

sary, and to treat the prisoner humanely and refrain from oppressing the prisoner; and if a sheriff is negligent in the sheriff's care and custody of a prisoner, and as a result the prisoner receives injury or meets death, or if a sheriff fails in the performance of the sheriff's duty to the prisoner, and the latter suffers injury or meets death as a result of such failure, the sheriff would, in a proper case, be liable on the sheriff's official bond, to the injured prisoner or to the prisoner's dependents. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

Code Sections 42-4-4 and 42-5-2 create

an obligation merely to provide inmates with access to medical care and the county met that obligation by contracting with a local medical services provider to provide medical care to the detention center. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

When officers arrested a decedent who died shortly after the arrest, the officers and a city could not be held liable for violating O.C.G.A. § 42-4-4 or O.C.G.A. § 42-5-2 by denying the decedent medical care because: (1) O.C.G.A. § 42-4-4 imposed a duty only upon sheriffs and deputies; (2) O.C.G.A. § 42-5-2 imposed a duty only on a governmental unit having physical custody of a detainee; and (3) the decedent was taken into custody by a county police officer and transported to a county jail, so the decedent was never in the custody of the city, and the suit could not be brought against the city under § 42-5-2. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

Sheriff's power to make purchases from third parties. — County sheriff had the authority to repaint and remark county-owned sheriff's vehicles assigned to the sheriff's exclusive use, but lacked the authority to modify portions of a county-owned building in which the sheriff's office and jail were housed, as the facility was shared with the superior, state, and magistrate courts of Clayton County, as well as the clerks of those courts, the solicitor general, and the district attorney, and hence, not under the sheriff's exclusive use. Summary judgment in favor of the county was reversed as to the former, but affirmed as to the latter. *Hill v. Clayton County Bd. of Comm'rs*, 283 Ga. App. 15, 640 S.E.2d 638 (2006).

Removal from office. — Under former Code 1933, §§ 24-2813, 24-2814, 77-110, and 77-111 (see now O.C.G.A. §§ 15-16-10 and 42-4-4), the provisions of former Code 1933, § 24-2724 (see now O.C.G.A. § 15-6-82), providing for the removal of clerks of the superior court from office, applied to the removal of sheriffs from office. *Adamson v. Leathers*, 60 Ga. App. 382, 3 S.E.2d 871 (1939).

Under former Code 1933, § 24-2724

(see now O.C.G.A. § 15-6-82), sheriffs were subject to be removed from office for "any sufficient cause," and sufficient cause means a cause relating to and affecting the administration of the office and material to the interests of the public. *Adamson v. Leathers*, 60 Ga. App. 382, 3 S.E.2d 871 (1939).

County's duty to use convicts for road work. — County has statutory authority to use the county's quota of convicts for constructing and maintaining the county's system of public roads, and it may also legally use convict labor for the purpose of doing any necessary work in or about the county's public works camps (now county correctional institutions). *Newman v. Aldredge*, 210 Ga. 765, 82 S.E.2d 823 (1954).

Authority to transfer prisoner. — Sheriff, and not the judge of the court, has the authority to transfer a prisoner awaiting trial to a jail in another county, and then only when the jail in the county where the prisoner is confined is "in an unsafe condition." *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

Court transferring prisoner to another jail. — Trial court may not, on the court's own motion, transfer a prisoner to another jail when the court, without the issue being raised, concludes the local jail is not secure. In re *Irvin*, 254 Ga. 251, 328 S.E.2d 215 (1985).

Recovery of fee by physician. — When a physician performs an operation on a prisoner at the physician request of the sheriff, the physician cannot maintain an action against the county to recover the physician's fee. *Nolan v. Cobb County*, 141 Ga. 385, 81 S.E. 124, 50 L.R.A. (n.s.) 1223 (1914).

Sovereign immunity in providing medical care. — Providing adequate medical attention for inmates under the defendant's custody and control is a ministerial act by the sheriff and his or her deputies and does not involve the exercise of discretion to provide medical care; thus, such act is not subject to either sovereign immunity or official immunity. *Cantrell v. Thurman*, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

Violation of duty. — Court granted summary judgment to the United States

in a suit alleging that conditions at a county jail violated the inmates' federal due process rights. A sheriff and the members of a county board of commissioners did not dispute that the conditions, including the denial of medical care in violation of O.C.G.A. § 42-4-4, were unconstitutional, and the evidence showed that they had subjective knowledge of the conditions, including copies of the United States' investigation reports, and acted with indifference that exceeded negligence. *United States v. Terrell County*, 457 F. Supp. 2d 1359 (M.D. Ga. 2006).

Cited in *Lumpkin County v. Davis*, 185 Ga. 393, 195 S.E. 169 (1938); *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938); *Moore v. Baldwin County*, 209 Ga. 541, 74 S.E.2d 449 (1953); *Cole v. Holland*, 219 Ga. 227, 132 S.E.2d 657 (1963); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007).

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Board entering contract with county to house county prisoners. — Board of Offender Rehabilitation (Corrections) cannot enter into contract with a county to house county prisoners while county jail is being rebuilt. 1954-56 Op. Att'y Gen. p. 527.

Expenditure of funds for parolee's medical expenses. — Board of Offender Rehabilitation (Corrections) is not authorized to expend funds for payment of medical expenses of a parolee injured in an escape from custody of county law enforcement officials prior to revocation of parole; rather, such is the duty of the sheriff. 1971 Op. Att'y Gen. No. 71-120.

Sheriffs' derivative duties. — As a natural concomitance of the duties imposed under former Code 1933, §§ 77-101, 77-110, and 77-111, and Ga. L. 1976, p. 949, § 2 (see now O.C.G.A. §§ 42-4-1, 42-4-5, and 42-5-100), the sheriff would be responsible for calculating the sentences of felony prisoners held in the county jail pending appeal, and would be the appropriate discharging authority should a sentence expire before a prisoner is transferred to the custody of state authorities. 1978 Op. Att'y Gen. No. U78-46.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 20-22.

C.J.S. — 18 C.J.S., Convicts, §§ 2, 5, 14. 72 C.J.S., Prisons and Rights of Prisoners, §§ 14, 63 et seq., 78 et seq., 123-125. 80 C.J.S., Sheriffs and Constables, §§ 128, 256, 257-259, 271.

ALR. — Personal liability of policeman, sheriff, or similar peace officer or his bond,

for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 ALR3d 700.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner, 79 ALR3d 1210.

42-4-5. Cruelty to inmates.

(a) No jailer, by duress or other cruel treatment, shall make or induce an inmate to accuse or give evidence against another; nor shall he be guilty of willful inhumanity or oppression to any inmate under his care and custody.

(b) Any jailer who violates subsection (a) of this Code section shall be punished by removal from office and imprisonment for not less than one year nor longer than three years. (Cobb's 1851 Digest, p. 805; Code 1863, § 4367; Code 1868, § 4405; Code 1873, § 4473; Code 1882, § 4473; Penal Code 1895, § 282; Penal Code 1910, § 286; Code 1933, §§ 77-104, 77-9901.)

Cross references. — Prohibition against cruel and unusual punishment, U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII.

JUDICIAL DECISIONS

Duty of care sheriff owes prisoners.

— Sheriff owes to a prisoner placed in the sheriff's custody a duty to keep the prisoner safely and free from harm, to render to the prisoner medical aid when necessary, and to treat the prisoner humanely and refrain from oppressing the prisoner; and when a sheriff is negligent in the sheriff's care and custody of a prisoner and as a result the prisoner receives injury or meets death, or when a sheriff fails in the performance of the sheriff's duty to the prisoner and the latter suffers injury or meets death as a result of such failure, the sheriff would, in a proper case, be liable on the sheriff's official bond, to the injured prisoner or to the prisoner's dependents. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

Liability of sheriff for prisoner's death.

— When a prisoner has been placed in the custody of and accepted by a sheriff through the sheriff's deputy, the jailer of the county, and if the prisoner is drunk and as a result of the prisoner's drunkenness sets fire to himself and is burned to death, the sheriff and the sureties on the sheriff's official bond are not

liable to the dependents of the deceased prisoner, upon the ground that the jailor was negligent in incarcerating the prisoner in a cell alone without first searching the prisoner and removing from the prisoner's person any object or article with which the prisoner might inflict injury upon himself or others, such as matches, and on the ground that the jailor did not respond to the drunken cries of the prisoner for help. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

Rape allegation failed. — Arrestee's state law claims in 42 U.S.C. § 1983 suit against a county sheriff, alleging that she was raped by a deputy at the county jail, failed as a matter of law because O.C.G.A. § 42-4-5 did not provide for a civil remedy. *Boyd v. Nichols*, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

Evidence sufficient to support conviction. — See *Waddell v. State*, 224 Ga. App. 172, 480 S.E.2d 224 (1996).

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Jackson v. Zant*, 210 Ga. App. 581, 436 S.E.2d 771 (1993); *Dep't of Corr. v. Barkwell*, 256 Ga. App. 877, 570 S.E.2d 13 (2002); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 20-22, 157, 171, 172.

ALR. — Liability for death or injury to prisoner, 61 ALR 569

Liability of prison authorities for injury

to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 ALR3d 678.

Duress, necessity, or conditions of con-

finement as justification for escape from prison, 54 ALR5th 141. abortion services and facilities, 28 ALR6th 485.
 Constitutional right of prisoners to

42-4-6. Confinement and care of tubercular inmates; crediting of time spent in hospital or institution against sentence.

(a) When any person confined in the common jail who is awaiting trial for any offense against the penal laws of this state or who has been convicted of an offense or who is serving any jail sentence imposed upon him by authority or who has been committed for any civil or criminal contempt or who is serving any misdemeanor sentence under county jurisdiction in a county correctional institution or other institution for the maintenance of county inmates is afflicted with tuberculosis, the judge of the superior court may order the person's delivery by the sheriff to an institution as may be approved and supported by the Department of Public Health for the care of tubercular patients; thereupon, he shall be so delivered and received in such institution and shall be securely confined, kept, and cared for.

(b) The period of time a person is kept and confined in a hospital or institution pursuant to subsection (a) of this Code section shall be credited upon any jail sentence being served by him, in the same manner as though he had remained in jail. Any person committed for any civil or criminal contempt shall remain for all purposes under the orders, jurisdiction, and authority of the court committing him for contempt while in the hospital or institution, in the same manner as though he had remained in the common jail. (Ga. L. 1960, p. 769, § 2; Ga. L. 1964, p. 365, § 1; Ga. L. 1994, p. 97, § 42; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

Cross references. — Hospitalization of persons for tuberculosis, T. 31, C. 14. 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).
Law reviews. — For article on the

OPINIONS OF THE ATTORNEY GENERAL

Confinement of tubercular prisoners. — When a prisoner is found to have tuberculosis, the prisoner will be sent to a state hospital or other approved hospital, and confinement there will count toward the prisoner's prison sentence. 1962 Op. Att'y Gen. p. 383.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 18, 136., 140

42-4-7. Maintenance of inmate record by sheriff; earned time allowances.

(a) The sheriff shall keep a record of all persons committed to the jail of the county of which he or she is sheriff. This record shall contain the name of the person committed, such person's age, sex, race, under what process such person was committed and from what court the process issued, the crime with which the person was charged, the date of such person's commitment to jail, the day of such person's discharge, under what order such person was discharged, and the court from which the order issued. This record shall be subject to examination by any person in accordance with the provisions of Article 4 of Chapter 18 of Title 50, relating to the inspection of public records.

(b)(1) The sheriff, chief jailer, warden, or other officer designated by the county as custodian of inmates confined as county inmates for probation violations of felony offenses or as provided in subsection (a) of Code Section 17-10-3 may award earned time allowances to such inmates based on institutional behavior. Earned time allowances shall not be awarded which exceed one-half of the period of confinement imposed, except that the sheriff or other custodian may authorize the award of not more than four days' credit for each day on which an inmate does work on an authorized work detail; provided, however, that such increased credit for performance on a work detail shall not apply to an inmate who is incarcerated for:

(A) A second or subsequent offense of driving under the influence under Code Section 40-6-391 within a five-year period of time, as measured from the date of any previous arrest for which a conviction was obtained or a plea of nolo contendere was accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted;

(B) A misdemeanor of a high and aggravated nature; or

(C) A crime committed against a family member as defined in Code Section 19-13-1.

(2) While an inmate sentenced to confinement as a county inmate is in custody as a county inmate, the custodian of such inmate may award an earned time allowance consistent with this subsection and subsection (b) of Code Section 17-10-4 based on the institutional behavior of such inmate while in custody as a county inmate.

(3) An inmate sentenced to confinement as a county inmate shall be released at the expiration of his or her sentence less the time deducted for earned time allowances.

(c) Commencing January 1, 1984, those provisions of subsection (b) of this Code section which provide for good-time allowances to be

awarded to inmates sentenced to confinement as county inmates as provided in subsection (a) of Code Section 17-10-3 shall apply to all such inmates in confinement on December 31, 1983, and all inmates who commit crimes on or after January 1, 1984, and are subsequently convicted and sentenced to confinement as county inmates. Conversion of the computation of the sentences of county inmates in confinement on December 31, 1983, from earned time governed sentences to good-time governed sentences shall be made by the sheriff or other custodian of such inmates. Commencing July 1, 1994, those provisions of subsection (b) of this Code section which provide for good-time allowances to be awarded to inmates sentenced to confinement as county inmates for probation violations of felony offenses shall apply to all such inmates in confinement on June 30, 1994, and all inmates whose probation is revoked or who commit crimes on or after July 1, 1994, and are subsequently sentenced to confinement as county inmates. Commencing July 1, 2000, the award of earned time allowances pursuant to subsection (b) of this Code section for persons who commit crimes on or after July 1, 2000, and are subsequently convicted and sentenced to confinement as county inmates and inmates whose probation is revoked on or after July 1, 2000, or who commit crimes on or after July 1, 2000, and are subsequently sentenced to confinement as county inmates is not automatic or mandatory but shall be based upon institutional behavior. (Ga. L. 1877, p. 111, § 1; Code 1882, § 366a; Penal Code 1895, § 1125; Penal Code 1910, § 1154; Code 1933, § 77-108; Ga. L. 1983, p. 1340, § 1; Ga. L. 1993, p. 632, § 1; Ga. L. 1994, p. 1955, § 1; Ga. L. 2000, p. 1111, § 2; Ga. L. 2004, p. 155, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1994, “of felony offenses” was substituted for “of, felony offenses,” in the first sentence of paragraph (b)(1).

Editor’s notes. — Ga. L. 2000, p. 1111, § 3, not codified by the General Assembly, provides that: “This Act shall become effective on July 1, 2000, and shall apply to

persons who commit crimes on or after such date and who are subsequently convicted and sentenced to confinement as county inmates and to persons whose probation is revoked on or after such date or who commit crimes on or after such date and who subsequently are sentenced to confinement as county inmates.”

JUDICIAL DECISIONS

Constitutionality of section. — This section is violative of U.S. Const., amend. 14 to the extent that the statute requires segregation of the races in the prisons and jails of Georgia. Otherwise, the statute remains in full force and effect. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), *aff’d*, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

Administrative enforcement of

good-time credit provisions. — Good-time credit provisions of O.C.G.A. § 42-4-7 work toward the end of encouraging good behavior among inmates while incarcerated. The provisions are directly related to the duties of administration and are affirmatively delegated to the custodians of inmates by the legislature. A trial court would therefore be without jurisdiction to usurp this function by ordering

that good-time credit be withheld until fines are paid. *Davis v. State*, 181 Ga. App. 498, 353 S.E.2d 7 (1987).

Imposition of probation on any time by which confinement is shortened due to good-time credit is prohibited by the pro-

vision of paragraph (b)(3) of O.C.G.A. § 42-4-7. *Hutchins v. State*, 243 Ga. App. 261, 533 S.E.2d 107 (2000).

Cited in *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

OPINIONS OF THE ATTORNEY GENERAL

Automatic accrual of earned-time.

— Custodian of a county inmate was not required to take any affirmative action under former law to award earned-time, which was automatic. 1984 Op. Att’y Gen. No. U84-10.

“Conversion” to good-time under subsection (c) of O.C.G.A. § 42-4-7 requires the custodian of an inmate in custody on December 31, 1983 to recompute the term of confinement by reducing that term by any period of time an inmate may have spent in a time-out status. 1984 Op. Att’y Gen. No. U84-10.

Due process requirements for deduction of good-time. — Since deductions of good-time from county misde-

meanor inmates under paragraph (b)(2) amount to the deprivation of a liberty interest, the minimal procedures established by *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), must be followed; therefore, an inmate is entitled to: (1) at least 24 hours written notice of the charges against the inmate; (2) a hearing at which the inmate may, consistent with the needs and good order of the prison, call witnesses and present evidence; and (3) a written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action. 1984 Op. Att’y Gen. No. U84-10.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 20-22, 204, 208 et seq.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 14, 142 et seq.

42-4-8. Inquiry into contents of inmate record by grand jury; failure to comply with Code Section 42-4-7.

It shall be the duty of the grand jury, at each term of the superior court held in the county, to inquire into the contents of the record kept by the sheriff as required by Code Section 42-4-7. If the record is not kept or is incorrectly kept, the grand jury shall so report to the court. Upon the report’s being made, the judge presiding shall cause the district attorney to have the sheriff served with a rule requiring him to show cause why he should not be punished for contempt. The judge shall inquire into the facts and, if he finds that Code Section 42-4-7 has not been complied with, he shall impose a fine of not less than \$25.00 nor more than \$50.00 for the first offense and not more than \$100.00 and not less than \$50.00 for each subsequent offense. The fines shall be enforced and collected by attachment, as in other cases of attachments against sheriffs. (Ga. L. 1877, p. 111, § 2; Code 1882, § 366b; Penal Code 1895, § 1126; Penal Code 1910, § 1155; Code 1933, § 77-109; Ga. L. 1994, p. 97, § 42.)

Cross references. — Frequency with which grand jury must perform duties, § 15-12-71.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Grand Jury, §§ 34-37.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 123, 124.

42-4-9. Conditions for receipt of federal prisoners.

The keeper of a county jail may decline to receive a person from the custody of anyone acting under the authority of the United States government. He may receive the person if the consent of the authority having control of county matters is first obtained. If the keeper receives the person he shall have the same duties and responsibilities toward him as in the case of inmates committed under the authority of this state. (Orig. Code 1863, § 334; Code 1868, § 395; Code 1873, § 359; Code 1882, § 359; Ga. L. 1889, p. 47, § 2; Penal Code 1895, § 1123; Penal Code 1910, § 1152; Code 1933, § 77-106.)

JUDICIAL DECISIONS

Liability for mistreatment of federal prisoner. — In the absence of Georgia statutory law there would be no liability on the part of a jailer for mistreatment of a United States prisoner whom a jailer is not required to receive. *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938).

United States court. — Keeper of a county jail of a state, who receives prisoners for the federal government, and is paid for their maintenance, is an officer of the United States court. *In re Birdsong*, 39 F. 599 (S.D. Ga. 1889). See *Erwin v. United States*, 37 F. 470 (S.D. Ga. 1889), rev'd on other grounds, 47 U.S. 676, 13 S. Ct. 439, 37 L. Ed. 328 (1893).

Keeper of county jail officer of

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 3.

42-4-10. Receipt of additional federal prisoners after initial acceptance.

If the keeper of the jail consents to receive a person from the custody of federal authorities, as provided in Code Section 42-4-9, neither the jailer nor the county authorities shall refuse to receive any other person so committed by the authority of the United States government unless 20 days' prior written notice of the sheriff's refusal to receive any more persons committed by the federal authorities is given by him to the United States marshal or other federal officers charged with the custody of such persons. (Ga. L. 1889, p. 47, § 3; Penal Code 1895, § 1124; Penal Code 1910, § 1153; Code 1933, § 77-107.)

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 3.

42-4-11. Procedure for transfer of person in custody upon change of venue.

In all cases in which a change of venue is made, the sheriff of the county from which a person in custody is to be moved shall carry the person to the county to which the change of venue was directed and deliver him to the sheriff of such county, who shall then take charge of the person as in other cases. The sheriff of the county from which the person is to be moved shall carry with him and deliver to the sheriff the warrant under which the person was arrested or the commitment. (Ga. L. 1868, p. 133, § 1; Code 1873, § 4688; Code 1882, § 4688; Penal Code 1895, § 1129; Penal Code 1910, § 1158; Code 1933, § 77-112.)

Cross references. — Change of venue generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VIII and § 17-7-150 et seq.

JUDICIAL DECISIONS

Official authorized to receive documents when change of venue granted.

— When in a criminal case a change of venue is granted, a certified copy of the order for that purpose is required to be transmitted to the clerk of the superior court of the county to which the change is

made; but the original indictment and other papers in the case are required to be sent to that county. *Graham v. State*, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

Cited in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

42-4-12. Penalty for refusal by officer to receive persons charged with or guilty of offense.

Except as otherwise provided in this Code section, any sheriff, constable, keeper of a jail, or other officer whose duty it is to receive persons charged with or guilty of an indictable offense who refuses to receive and take charge of such a person shall, upon conviction thereof, be guilty of a misdemeanor and shall be punished by a fine of not more than \$1,000.00. A sheriff, constable, keeper of a jail, or other officer whose duty it is to receive persons charged with or guilty of an indictable offense shall be authorized to refuse acceptance of any person who has not received medical treatment for obvious physical injuries or conditions of an emergency nature. Upon such refusal, it shall be the responsibility of the arresting agency to take the individual to a health care facility or health care provider in order to secure a medical release. Upon medical release by the health care facility or health care provider, the sheriff, constable, or keeper of the jail must assume custody of the

individual; provided, however, that in all cases the sheriff, constable, or keeper of the jail must assume custody where no health care facility is located in the county in which the arrest occurred and, in such instances, the governing authority of the arresting agency shall pay all costs related to the medical release. (Cobb's 1851 Digest, p. 807; Code 1863, § 4380; Code 1868, § 4418; Code 1873, § 4486; Code 1882, § 4486; Penal Code 1895, § 285; Penal Code 1910, § 289; Code 1933, § 77-9902; Ga. L. 1996, p. 1638, § 1.)

Law reviews. — For review of 1996 legislation relating to jails, see 13 Ga. U. L. Rev. 269 and 273 (1996).

JUDICIAL DECISIONS

Implied right to refuse persons not charged with indictable offense. — This section by implication gives the sheriff a right to refuse to receive any prisoner who is not charged with or guilty of an indictable offense, in that the only penalties provided are for refusal to receive persons charged with or guilty of indictable offenses. *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938).

Sheriff of county has a statutory duty to accept all city prisoners and the county commissioners have authority to require the sheriff to do so. *Griffin v. Chatham County*, 244 Ga. 628, 261 S.E.2d 570 (1979).

Cited in *Smith v. Glen Falls Indem. Co.*, 71 Ga. App. 697, 32 S.E.2d 105 (1944); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

OPINIONS OF THE ATTORNEY GENERAL

No surcharge payment as condition of serving sentence. — Sheriff must accept into custody those individuals convicted of criminal offenses who have been sentenced to a term of incarceration, and

the sheriff may not require payment of a surcharge as a condition precedent to service of the sentence. 1992 Op. Att'y Gen. No. U92-4.

42-4-13. Possession of drugs, weapons, or alcohol by inmates.

(a) As used in this Code section, the term:

(1) "Alcoholic beverage" means and includes all alcohol, distilled spirits, beer, malt beverage, wine, or fortified wine.

(2) "Controlled substance" means a drug, substance, or immediate precursor as defined in Code Section 16-13-21.

(3) "Dangerous drug" has the same meaning as defined by Code Section 16-13-71.

(4) "Jail" means any county jail, municipal jail, or any jail or detention facility operated by a county, municipality, or a regional jail authority as authorized under Article 5 of this chapter.

(5) "Jailer" means the sheriff in the case of any county jail, or the chief of police if the jail is under the supervision of the chief of police

of a municipality, or the warden, captain, administrator, superintendent, or other officer having supervision of any other jail, or the designee of such officer.

(b)(1) It shall be unlawful for an inmate of a jail to possess any controlled substance, dangerous drug, gun, pistol, or other dangerous weapon or marijuana.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

(3) Notwithstanding the provisions of this subsection, possession of a controlled substance, a dangerous drug, or marijuana shall be punished as provided in Chapter 13 of Title 16; provided, however, that the provisions of Code Section 16-13-2 shall not apply to a violation of paragraph (1) of this subsection.

(4) The provisions of this subsection shall not prohibit the lawful use or dispensing of a controlled substance or dangerous drug to an inmate with the knowledge and consent of the jailer when such use or dispensing is lawful under the provisions of Chapter 13 of Title 16.

(c)(1) Unless otherwise authorized by law, it shall be unlawful for an inmate of a jail to possess any alcoholic beverage.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor.

(d)(1)(A) It shall be unlawful for any person to come inside the guard lines established at any jail with, or to give or have delivered to an inmate of a jail, any controlled substance, dangerous drug, marijuana, or any gun, pistol, or other dangerous weapon without the knowledge and consent of the jailer or a law enforcement officer.

(B) It shall be unlawful for any person to come inside the guard lines established at any jail with, or to give or have delivered to an inmate of a jail, any alcoholic beverage without the knowledge and consent of the jailer or a law enforcement officer; provided, however, that the provisions of this subsection shall not apply to nor prohibit the use of an alcoholic beverage by a clergyman or priest in sacramental services only.

(2) Except as otherwise provided in paragraph (3) of this subsection, any person who violates subparagraph (A) of paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years. Any person who violates subparagraph (B) of paragraph (1) of this subsection shall be guilty of a misdemeanor.

(3) Notwithstanding the provisions of paragraph (2) of this subsection, the possession, possession with intent to distribute, trafficking,

or distribution of a controlled substance or marijuana shall be punished as provided in Chapter 13 of Title 16; provided, however, that the provisions of Code Section 16-13-2 shall not apply to a violation of subparagraph (A) of paragraph (1) of this subsection.

(e) It shall be unlawful for any person to obtain, to procure for, or to give to an inmate, or to bring within the guard lines, any other article or item without the knowledge and consent of the jailer or a law enforcement officer. Any person violating this subsection shall be guilty of a misdemeanor.

(f)(1) It shall be unlawful for any person to come inside the guard lines or be within any jail while under the influence of a controlled substance, dangerous drug, or marijuana without the knowledge and consent of the jailer or a law enforcement officer unless such person has a valid prescription for such controlled substance or dangerous drug issued by a person licensed under Chapter 11 or 34 of Title 43 and such prescribed substance is consumed only as authorized by the prescription. Any person convicted of a violation of this subsection shall be punished by imprisonment for not less than one nor more than four years.

(2) It shall be unlawful for any person to come inside the guard lines or be within any jail while under the influence of alcohol without the knowledge and consent of the jailer or a law enforcement officer. Any person violating this subsection shall be guilty of a misdemeanor.

(g) It shall be unlawful for any person to loiter where inmates are assigned after having been ordered by the jailer or a law enforcement officer to desist therefrom. Any person violating this subsection shall be guilty of a misdemeanor.

(h) It shall be unlawful for any person to attempt, conspire, or solicit another to commit any offense defined by this Code section and, upon conviction thereof, shall be punished by imprisonment not exceeding the maximum punishment prescribed for the offense, the commission of which was the object of the attempt, conspiracy, or solicitation.

(i) Any violation of this Code section shall constitute a separate offense.

(j) Perimeter guard lines shall be established at every jail by the jailer thereof. Such guard lines shall be clearly marked by signs on which shall be plainly stamped or written: "Guard line of ____." Signs shall also be placed at all entrances and exits for vehicles and pedestrians at the jail and at such intervals along the guard lines as will reasonably place all persons approaching the guard lines on notice of the location of the jail. (Code 1981, § 42-4-13, enacted by Ga. L. 1987, p. 611, § 1; Ga. L. 1993, p. 630, § 1; Ga. L. 1999, p. 648, § 1; Ga. L. 2000, p. 136, § 42.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, the subsection (a) designation was added at the beginning of this Code section.

Law reviews. — For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 181 (1993).

JUDICIAL DECISIONS

Definition of dangerous weapon. — Words “dangerous weapon” are not words of art but words of common understanding and meaning which require no definition for understanding by the jury. *Stone v. State*, 236 Ga. App. 365, 511 S.E.2d 915 (1999).

Attorney disbarred for violating provisions. — Attorney was disbarred as a result of 10 convictions for violating

O.C.G.A. § 42-4-13(e) for providing contraband to an inmate because the convictions involved moral turpitude subject to discipline under Ga. St. Bar R. 4-102(d):8.4(a)(3) as the offenses reflected on the attorney’s dishonesty, amounted to obstruction of justice, and placed others in danger. In the *Matter of Jones*, 293 Ga. 264, 744 S.E.2d 6 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprintable offenses. — Violation of subsection (c), which provides that it is a misdemeanor for an inmate of a jail to possess any alcoholic beverage, is not at this time designated as an offense for which those charged with a violation are to be fingerprinted. 1987 Op. Att’y Gen. No. 87-21.

If the person is not already incarcerated, violations of subsections (e) and (h) and subparagraph (d)(1)(B) are design-

nated as offenses for which those charged are to be fingerprinted. 1999 Op. Att’y Gen. No. 99-17.

Violation of paragraph (f)(2) is not designated as an offense for which fingerprinting is required. 1999 Op. Att’y Gen. No. 99-17.

Violation of subsection (g) is designated as an offense for which those charged are to be fingerprinted. 1999 Op. Att’y Gen. No. 99-17.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 73.

42-4-14. “Illegal alien” defined; determination of nationality of person charged with felony and confined in a jail facility.

(a) As used in this Code section, the term “illegal alien” means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(b) When any person is confined, for any period, in the jail of a county or municipality or a jail operated by a regional jail authority in compliance with Article 36 of the Vienna Convention on Consular Relations, a reasonable effort shall be made to determine the nationality of the person so confined.

(c) When any foreign national is confined, for any period, in a county or municipal jail, a reasonable effort shall be made to verify that such

foreign national has been lawfully admitted to the United States and if lawfully admitted, that such lawful status has not expired. If verification of lawful status cannot be made from documents in the possession of the foreign national, verification shall be made within 48 hours through a query to the Law Enforcement Support Center (LESC) of the United States Department of Homeland Security or other office or agency designated by the federal government. If the foreign national is determined to be an illegal alien, the keeper of the jail or other officer shall notify the United States Department of Homeland Security, or other office or agency designated for notification by the federal government.

(d) Nothing in this Code section shall be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release; provided, however, that upon verification that any person confined in a jail is an illegal alien, such person may be detained, arrested, and transported as authorized by state and federal law.

(e) The Georgia Sheriffs Association shall prepare and issue guidelines and procedures used to comply with the provisions of this Code section. (Code 1981, § 42-4-14, enacted by Ga. L. 2006, p. 105, § 5/SB 529; Ga. L. 2008, p. 1137, § 4/SB 350; Ga. L. 2009, p. 8, § 42/SB 46; Ga. L. 2009, p. 970, § 2/HB 2; Ga. L. 2011, p. 794, § 13/HB 87.)

Code Commission notes. — The amendment of this Code section by Ga. L. 2009, p. 8, § 42, irreconcilably conflicted with and was treated as superseded by Ga. L. 2009, p. 970, § 2, effective January 1, 2010. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Editor's notes. — Ga. L. 2006, p. 105, § 1/SB 529, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Security and Immigration Compliance Act.' All requirements of this Act concerning immigration or the classification of immigration status shall be construed in conformity with federal immigration law."

Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the

other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 247 (2006). For article, "The Georgia Security and Immigration Compliance Act: Comprehensive Immigration Reform in Georgia — 'Think Globally ... Act Locally,'" see 13 Ga. St. B. J. 14 (2007).

42-4-15. Limitations on medical charges for providing emergency medical care services to individuals in custody.

(a) As used in this Code section, the term:

(1) “Detainee” means a person held in a detention facility who is charged with or convicted of a criminal offense or charged with or adjudicated for a delinquent act and a person detained, arrested, or otherwise held in lawful custody for a criminal offense or delinquent act.

(2) “Detention facility” means any municipal or county jail or other facility used for the detention of persons charged with or convicted of a criminal offense or charged with or adjudicated for a delinquent act.

(3) “Emergency health care” means bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in placing the person’s health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term covers any form of emergency medical treatment, including dental, optical, psychological, or other types of emergency conditions.

(4) “Follow-up health care” means medical and hospital care and medication administered in conjunction with and arising from emergency health care treatment.

(b) A hospital or other health care facility licensed or established pursuant to Chapter 7 of Title 31 which is not a party to an emergency health care services contract with a sheriff or a governing authority or its agent on July 1, 2011, shall be reimbursed no more than the applicable Georgia Medicaid rate for emergency health care and follow-up health care services provided to a detainee.

(c) No hospital or other health care facility shall discharge a detainee with an emergency health care condition so as to require an immediate transfer to another medical provider for the same condition unless the reasonable standard of care requires such a transfer.

(d) Nothing in this Code section shall be construed to limit reimbursements for emergency health care services when insurance coverage is available for payment for such services. Nor shall this Code section be construed so as to limit or remove responsibility for payment of emergency health care services by a provider of insurance that is otherwise responsible for payment of part or all of such services.

(e) Nothing in this Code section shall prohibit the governing authority from negotiating higher fees or rates with hospitals. (Code 1981, § 42-4-15, enacted by Ga. L. 2011, p. 440, § 1/HB 197.)

ARTICLE 2

CONDITIONS OF DETENTION

OPINIONS OF THE ATTORNEY GENERAL

Article does not repeal Ch. 2, T. 25. — While the statutory provisions of detention deals, in part, with the same subject matter as the fire safety standards set forth in Ch. 2, T. 25 for certain jails, the General Assembly, in enacting these pro-

visions, apparently did not intend to impliedly amend Ga. L. 1949, p. 1057, § 1 (see now O.C.G.A. Ch. 2, T. 25) and such construction is not necessary for a reasonable interpretation of the detention provisions. 1980 Op. Att'y Gen. No. 80-66.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 77-79, 81-86, 97, 157 et seq.

Am. Jur. Trials. — Prisoners' Rights Litigation, 22 Am. Jur. Trials 1.

Asserting Claims of Unconstitutional Prison Conditions, 64 Am. Jur. Trials 425.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61-88, 123-127.

ALR. — Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219.

Mandamus, under 28 USC § 1361, to obtain change in prison condition or release of federal prisoner, 114 ALR Fed. 225.

42-4-30. Definitions.

As used in this article, the term:

(1) "Detention facility" means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) "Inmate" means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense.

(3) "Officer in charge" means the sheriff, if the detention facility is under his supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Ga. L. 1973, p. 890, § 1; Ga. L. 1985, p. 149, § 42.)

JUDICIAL DECISIONS

Cited in Cherokee County v. North Cobb Surgical Assocs., P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

42-4-31. Required safety and security measures.

(a) It shall be unlawful for any person having charge of or responsibility for any detention facility to incarcerate any person in the

detention facility unless a full-time jailer is on duty at the detention facility at all times while a person is incarcerated therein. For purposes of this Code section, a full-time dispatcher may also serve simultaneously as a full-time jailer in the case of:

(1) A municipal detention facility with 12 or fewer inmates incarcerated therein if such dispatcher either:

(A) Is equipped with mobile telephone and radio equipment which will allow such dispatcher to perform the duties of a dispatcher and the duties of a full-time jailer at the same time; or

(B) Is provided with temporary assistance or relief from the duties of a dispatcher while performing the duties of a jailer; or

(2) A municipal detention facility of a municipal corporation having a population of 6,000 or less if such dispatcher is certified both as a jailer and a dispatcher by the Georgia Peace Officer Standards and Training Council.

(b) If the local governing authority having jurisdiction over a detention facility has knowledge that the facility is operating without a full-time jailer on duty while persons are incarcerated therein, each member of the local governing authority having such knowledge and failing to attempt to correct the deficiency shall be in violation of this article.

(c) The officer in charge of a detention facility shall have the facility inspected semiannually by an officer from the state fire marshal's office or an officer selected by the Safety Fire Commissioner. Each detention facility shall be required to comply with this article with regard to fire safety and the applicable rules and regulations promulgated by the Safety Fire Commissioner. The inspecting officer shall fill out a form provided by the officer in charge and the form shall be posted in a conspicuous place by the officer in charge, thereby evidencing inspection of the facility.

(d) There shall be at least two separate keys for all locks at a detention facility, with one set in use and all duplicate keys safely stored under the control of a jailer or other administrative employee for emergency use. All security personnel must be familiar with the locking system of the detention facility and must be able immediately to release inmates in the event of a fire or other emergency. Regular locking and unlocking of door and fire escape locks shall be made to determine if they are in good working order. Any damaged or nonfunctioning security equipment shall be promptly repaired. (Ga. L. 1973, p. 890, § 2; Ga. L. 1990, p. 1371, § 1; Ga. L. 1991, p. 1009, § 1.)

Cross references. — Liability of sheriffs for misconduct of jailers, § 15-16-24. Regulation of fire hazards to persons and property generally, T. 25, C. 2.

JUDICIAL DECISIONS

Cited in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

RESEARCH REFERENCES

ALR. — Liability for death or injury to prisoner, 61 ALR 569.

42-4-32. Sanitation and health requirements generally; meals; inspections; medical treatment.

(a) All aspects of food preparation and food service shall conform to the applicable standards of the Department of Public Health.

(b) All inmates shall be given not less than two substantial and wholesome meals daily.

(c) Sanitation inspections of both facilities and inmates shall be made as frequently as is necessary to ensure against the presence of unsanitary conditions. An official from the Department of Public Health or an officer designated by the commissioner of public health shall inspect the facilities at least once every three months. New inmates should be carefully classified, with adequate separation and treatment given as needed.

(d) The officer in charge or his designated representative shall assure that each inmate is observed daily, and a physician shall be immediately called if there are indications of serious injury, wound, or illness. The instructions of the physician shall be strictly carried out. Ill inmates shall be furnished such food as is prescribed by the attending physician. (Ga. L. 1973, p. 890, § 3; Ga. L. 1977, p. 761, § 1; Ga. L. 1990, p. 135, § 2; Ga. L. 2009, p. 453, §§ 1-4, 1-6/HB 228; Ga. L. 2011, p. 705, §§ 6-3, 6-5/HB 214.)

Cross references. — Authority of grand juries to inspect sanitary conditions in jails, § 15-12-78. Liability of sheriffs for misconduct of jailers, § 15-16-24.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

JUDICIAL DECISIONS

Violation of duties. — Court granted summary judgment to the United States in a suit alleging that conditions at a county jail violated the inmates' federal due process rights. A sheriff and the members of a county board of commissioners did not dispute that the conditions, in-

cluding the presence of vermin and sewerage problems, in violation of O.C.G.A. § 42-4-32, were unconstitutional, and the evidence showed that they had subjective knowledge of the conditions, including copies of the United States' investigation reports, and acted with indifference that

exceeded negligence. *United States v. Terrell County*, 457 F. Supp. 2d 1359 (M.D. Ga. 2006). **Cited in** *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

42-4-33. Penalty for violations of article.

Any person who violates this article shall be guilty of a misdemeanor. (Ga. L. 1973, p. 890, § 4.)

ARTICLE 3

MEDICAL SERVICES FOR INMATES

Code Commission notes. — Ga. L. 1992, p. 2125, § 2, and Ga. L. 1992, p. 2942, § 1, both enacted a new Article 3 of Chapter 4. Pursuant to Code Section 28-9-5, in 1992, the article enacted by Ga. L. 1992, p. 2942, § 1, was redesignated Article 4 of Chapter 4.

42-4-50. Definitions.

As used in this article, the term:

(1) “Detention facility” means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) “Governing authority” means the governing authority of the county or municipality in which the detention facility is located.

(3) “Inmate” means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense. Such term does not include any sentenced inmate who is the responsibility of the State Department of Corrections.

(4) “Medical care” includes medical attention, dental care, and medicine and necessary and associated costs such as transportation, guards, room, and board.

(5) “Officer in charge” means the sheriff, if the detention facility is under his or her supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Code 1981, § 42-4-50, enacted by Ga. L. 1992, p. 2125, § 2; Ga. L. 1995, p. 1059, § 1; Ga. L. 1996, p. 1081, § 1; Ga. L. 1996, p. 1264, § 1.)

Law reviews. — For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992). For review of 1996 legislation relating to jails, see 13 Ga. St. U.L. Rev. 269 and 273 (1996).

JUDICIAL DECISIONS

Cited in *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

RESEARCH REFERENCES

ALR. — Prisoner's right to die or refuse medical treatment, 66 ALR5th 111.

42-4-51. Information as to inmate's health insurance or eligibility for benefits; access to medical services; liability for payment; inmate's liability for costs of medical care; procedure for recovery against inmate.

(a) The officer in charge or his or her designee may require an inmate to furnish the following information:

(1) The existence of any health insurance, group health plan, or prepaid medical care coverage under which the inmate is insured;

(2) The eligibility for benefits to which the inmate is entitled under Article 7 of Chapter 4 of Title 49, the "Georgia Medical Assistance Act of 1977";

(3) The name and address of the third-party payor; and

(4) The policy or other identifying number.

(b) The officer in charge will provide a sick, injured, or disabled inmate access to medical services and may arrange for the inmate's health insurance carrier to pay the health care provider for the medical service rendered.

(c) The liability for payment for medical care described under subsection (b) of this Code section may not be construed as requiring payment by any person or entity, except by an inmate personally or his or her carrier through coverage or benefits described under paragraph (1) of subsection (a) of this Code section.

(d) If an inmate is not eligible for such health insurance benefits, then the inmate shall be liable for the costs of such medical care provided to the inmate and the assets and property of such inmate may be subject to levy and execution under court order to satisfy such costs. An inmate in a detention facility shall cooperate with the governing authority in seeking reimbursement under this article for medical care expenses incurred by the governing authority for that inmate. An inmate who willfully refuses to cooperate as provided in this Code section shall not receive or be eligible to receive any good-time allowance or other reduction of time to be served.

(e)(1) An attorney for a governing authority may file a civil action to seek reimbursement from an inmate for the costs of medical care provided to such inmate while incarcerated.

(2) A civil action brought under this article shall be instituted in the name of the governing authority and shall state the date and place of sentence, the medical care provided to such inmate, and the amount or amounts due to the governing authority pursuant to this Code section.

(3) If necessary to protect the governing authority's right to obtain reimbursement under this article against the disposition of known property, the governing authority may seek issuance of an ex parte restraining order to restrain the defendant from disposing of the property pending a hearing on an order to show cause why the particular property should not be applied to reimbursement of the governing authority for the costs of medical care provided to the defendant as an inmate.

(4) To protect and maintain the property pending resolution of the matter, the court, upon request, may appoint a receiver.

(f) Before entering any order on behalf of the governing authority against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support.

(g) The court may enter a money judgment against the defendant and may order that the defendant's property is liable for reimbursement for the costs of medical care provided to the defendant as an inmate.

(h) The sentencing judge and the sheriff of any county in which a prisoner's property is located shall furnish to the attorney for the governing authority all information and assistance possible to enable the attorney to secure reimbursement for the governing authority under this article.

(i) The reimbursements secured under this article shall be credited to the general fund of the governing authority to be available for general fund purposes. The treasurer of such governing authority may determine the amount due the governing authority under this article and render sworn statements thereof. These sworn statements shall be considered prima-facie evidence of the amount due.

(j) Nothing in this Code section shall be construed to relieve the governing authority, governmental unit, subdivision, or agency having the physical custody of an inmate from its responsibility to pay for any medical and hospital care rendered to such inmate regardless of

whether such individual has been convicted of a crime. (Code 1981, § 42-4-51, enacted by Ga. L. 1992, p. 2125, § 2; Ga. L. 1996, p. 1264, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, “third-party” was substituted for “third party” in paragraph (a)(3).

JUDICIAL DECISIONS

Violation of duties. — Court granted summary judgment to the United States in a suit alleging that conditions at a county jail violated the inmates’ federal due process rights. A sheriff and the members of a county board of commissioners did not dispute that the conditions, including the denial of medical care, in violation of O.C.G.A. § 42-4-51, were unconstitutional, and the evidence showed

that they had subjective knowledge of the conditions, including copies of the United States’ investigation reports, and acted with indifference that exceeded negligence. *United States v. Terrell County*, 457 F. Supp. 2d 1359 (M.D. Ga. 2006).

Cited in *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

ARTICLE 4

DEDUCTIONS FROM INMATE ACCOUNTS FOR EXPENSES

Code Commission notes. — Ga. L. 1992, p. 2125, § 2, and Ga. L. 1992, p. 2942, § 1, both enacted a new Article 3 of Chapter 4. Pursuant to Code Section

28-9-5, in 1992, the article enacted by Ga. L. 1992, p. 2942, § 1, was redesignated Article 4 of Chapter 4.

42-4-70. Definitions.

As used in this article, the term:

(1) “Detention facility” means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) “Inmate” means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense.

(3) “Medical treatment” means each visit initiated by the inmate to an institutional physician; physician’s extender, including a physician assistant or a nurse practitioner; dentist; optometrist; or psychiatrist for examination or treatment.

(4) “Officer in charge” means the sheriff, if the detention facility is under his supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Code 1981, § 42-4-70, enacted by Ga. L. 1992, p. 2942, § 1; Ga. L. 1995, p. 1059, § 2; Ga. L. 1996, p. 1081, § 2; Ga. L. 2009, p. 859, § 3/HB 509.)

Editor's notes. — Ga. L. 1995, p. 1059, effective July 1, 1995, purported to amend paragraph (1) of subsection (a); however, this Code section does not contain a subsection (a), and the amendment is deemed to apply to paragraph (1) following the undesignated introductory paragraph.

Law reviews. — For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992). For review of 1996 legislation relating to jails, see 13 Ga. St. U.L. Rev. 269 and 273 (1996).

JUDICIAL DECISIONS

Cited in Cherokee County v. North Cobb Surgical Assocs., P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

42-4-71. Deduction of costs from inmate's account for destruction of property, medical treatment, and other causes; exception for certain medical costs.

(a) The officer in charge may establish by rules or regulations criteria for a reasonable deduction from money credited to the account of an inmate to:

(1) Repay the costs of:

(A) Public property willfully damaged or destroyed by the inmate during his incarceration;

(B) Medical treatment for injuries inflicted by the inmate upon himself or others;

(C) Searching for and apprehending the inmate when he escapes or attempts to escape; such costs to be limited to those extraordinary costs incurred as a consequence of the escape; or

(D) Quelling any riot or other disturbance in which the inmate is unlawfully involved;

(2) Defray the costs paid by a municipality or county for medical treatment for an inmate, which medical treatment has been requested by the inmate, provided that such deduction from money credited to the account of an inmate shall not exceed \$5.00 for each such occurrence of treatment received by the inmate at the inmate's request; provided, further, that if the balance in an inmate's account is \$10.00 or less, such fee shall not be charged; and provided, further, that in the event that the costs of medical treatment of an inmate have been collected from said inmate pursuant to Code Section 42-4-51, there shall be no deductions from money credited to the account of an inmate under the provisions of this paragraph for the cost of such medical treatment.

(b) The provisions of paragraph (2) of subsection (a) of this Code section shall not apply in any case where an officer of the detention

facility or a medical practitioner determines that an inmate is in need of medical treatment.

(c) All sums collected for medical treatment shall be reimbursed to the inmate if such inmate is acquitted or otherwise exonerated of all charges for which the inmate was being held. (Code 1981, § 42-4-71, enacted by Ga. L. 1992, p. 2942, § 1; Ga. L. 1993, p. 304, § 1; Ga. L. 1996, p. 1264, § 3.)

Cross references. — Repayment of costs as condition of probation, § 42-8-35.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, “and pro-

vided, further, that in the event” was substituted for “provided, however, that in the event” in paragraph (a)(2).

ARTICLE 5

REGIONAL JAIL AUTHORITIES

42-4-90. Short title.

This article shall be known and may be cited as the “Regional Jail Authorities Act.” (Code 1981, § 42-4-90, enacted by Ga. L. 1995, p. 292, § 1.)

42-4-91. Statement of authority; policy of state.

(a) This article is enacted pursuant to authority granted to the General Assembly by the Constitution of Georgia. Each authority created by this article is created for nonprofit and public purposes; and it is found, determined, and declared that the creation of each such authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of this state and that the authority is an institution of purely public charity and will be performing an essential governmental function in the exercise of the power conferred upon it by this article. For such reasons, the state covenants from time to time with the holders of the bonds issued under this article that such authority shall be required to pay no taxes or assessments imposed by the state or any of its counties, municipal corporations, political subdivisions, or taxing districts upon any property acquired by the authority or under its jurisdiction, control, possession, or supervision or leased by it to others; or upon its activities in the operation or maintenance of any such property; or upon any rentals, charges, purchase price, installments, or otherwise; and that the bonds of such authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. The tax exemption provided in this Code section shall include exemption from sales and use tax on property purchased by the authority or for use by the authority.

(b) It is the express policy of the State of Georgia that any authority created by this article shall be authorized to enter into agreements with any county or municipality within the same county as the regional jail authority for the purpose of building, owning, and operating a jail facility for the county or municipality. (Code 1981, § 42-4-91, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 1.)

42-4-92. Definitions.

As used in this article, the term:

(1) "Authority" means each public body corporate and politic created pursuant to this article.

(2) "Cost of project" means all costs of site preparation and other start-up costs; all costs of construction; all costs of real and personal property required for the purposes of the jail facilities related thereto, including land and any rights or undivided interest therein, easements, franchises, fees, permits, approvals, licenses, and certificates and the securing of such permits, approvals, licenses, and certificates and all machinery and equipment, including motor vehicles which are used for jail functions; financing charges and interest prior to and during construction and during such additional period as the authority may reasonably determine to be necessary for the placing of the jail in operation; costs of engineering, architectural, and legal services; cost of plans and specifications and all expenses necessary or incident to determining the feasibility or practicability of the jail; administrative expenses; and such other expenses as may be necessary or incidental to the financing authorized in this article. The costs of any jail may also include funds for the creation of a debt service reserve, a renewal and replacement reserve, and such other reserves as may be reasonably required by the authority for the operation of any jail and as may be authorized by any bond resolution or trust agreement or indenture pursuant to the provisions of which the issuance of any such bonds may be authorized. Any obligation or expense incurred for any of the foregoing purposes shall be regarded as a part of the costs of the jail and may be paid or reimbursed as such out of the proceeds of user fees, or revenue bonds or notes issued under this article for such jail, or from other revenues obtained by the authority.

(3) "County" means any county of this state or governmental entity formed by the consolidation of a county and one or more municipal corporations.

(4) "County regional jail authority" means a regional jail authority formed by counties pursuant to this article.

(5) "Governing body" means the elected or duly appointed officials constituting the governing body of each county in the state.

(6) "Management committee" means a regional jail authority management committee created pursuant to Code Section 42-4-95.

(7) "Municipal regional jail authority" means a regional jail authority formed by municipalities within the same county pursuant to this article.

(8) "Municipality" means any municipal corporation of this state.

(9) "Project" means a jail and all other structures including electric, gas, water, and other utilities and facilities, equipment, personal property, and vehicles which are deemed by the authority as necessary and convenient for the operation of the jail. (Code 1981, § 42-4-92, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 2; Ga. L. 1997, p. 143, § 42.)

42-4-93. Creation of authorities; ordinance or resolution required; agreement; approval of sheriff; exemption from Georgia State Financing and Investment Commission Act.

(a) Any two or more counties may jointly form an authority, to be known as the county regional jail authority for such counties. Any two or more municipalities within the same county may jointly form an authority, to be known as the municipal regional jail authority for such municipalities. Municipalities located in more than one county may participate in municipal regional jail authorities in each county in which the municipality is located. No authority shall transact any business or exercise any powers under this article until the governing authorities of the counties or municipalities involved declare, by ordinance or resolution, that there is a need for an authority to function and until the governing authorities authorize the chief elected official of each county or municipality to enter into an agreement with the other counties or municipalities participating in the authority for the activation of an authority and such agreement is executed. Such authorities shall be public bodies, corporate and politic, and instrumentalities of the State of Georgia. A copy of the ordinance or resolution and agreement among participant counties or participant municipalities shall be filed with the Secretary of State who shall maintain a record of all authority activities under this article.

(b) No county may be included in an authority without approval of the sheriff of the participant county.

(c) Article 2 of Chapter 17 of Title 50, the "Georgia State Financing and Investment Commission Act," shall not apply to any authority created under this Code section. (Code 1981, § 42-4-93, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 3.)

42-4-94. Board of directors; members; election of officers; expenses; duties; addition of counties or municipalities to authority.

(a) Control and management of the authority shall be vested in a board of directors. Each county participating in an authority shall appoint the sheriff of the county for the term of such sheriff's office. One other member from each participating county shall be appointed for a four-year term. Each municipality participating in an authority shall appoint two people to serve on the board of directors, each for a four-year term. For each county or municipal regional jail authority board of directors, an additional member shall be appointed by the directors themselves. The directors shall elect one of their members as chairperson and another as vice chairperson and shall also elect a secretary and a treasurer or a secretary-treasurer, either of whom may, but need not be, a director. The directors shall receive no compensation for their services but shall be reimbursed for actual expenses incurred in the performance of their duties. The directors may make bylaws and regulations for the governing of the authority and may delegate to one or more of the officers, agents, and employees of the authority such powers and duties as may be deemed necessary and proper.

(b) It is the duty of the board of directors to erect or repair, when necessary, the jail and to furnish the jail with all the furniture necessary for the different rooms, offices, and cells. The jail shall be erected and kept in order and repaired at the expense of the authority under the direction of the board of directors which is authorized to make all necessary contracts for that purpose. The board of directors shall pass an annual budget sufficient for the efficient and effective operation of the jail.

(c) Members of the board of directors of an authority formed pursuant to this Code section may agree that additional counties, if a county regional jail authority, or additional municipalities, if a municipal regional jail authority, may become members of such authority subsequent to its formation upon an affirmative vote of two-thirds of the members of such board of directors under such terms as may be imposed by such two-thirds of the members of such board of directors. (Code 1981, § 42-4-94, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 4.)

42-4-95. Management committee of county regional jail authority; management and operation of municipal regional jail authority.

(a) The jail of a county regional jail authority shall be managed and operated by a regional jail authority management committee composed

of all of the sheriffs from the participant counties. The county regional jail authority management committee shall have all of the responsibilities provided in Code Section 15-16-24 and this chapter, including the employment and supervision of all personnel employed to operate the jail. The sheriffs shall elect one of their members as chairperson and another as vice chairperson and shall also elect a secretary who may or may not be a member of the committee. The committee shall receive no compensation for their services but shall be reimbursed for actual expenses incurred in the performance of their duties. The committee may delegate to one or more of the officers, agents, and employees of the committee such powers and duties as may be deemed necessary and proper.

(b) In the event that the county regional jail authority consists of an even number of counties, the sheriffs shall then elect one member, who may or may not be a member of the authority's board of directors, to serve on the management committee.

(c) The board of directors of a municipal regional jail authority shall hire or contract with a person, firm, corporation, or local government to manage and operate the regional jail. Such person, firm, corporation, or local government shall have all of the responsibilities provided in this chapter for municipal jails and jailers, including the employment and supervision of all personnel employed to operate the jail. (Code 1981, § 42-4-95, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 5.)

42-4-96. Quorums; voting requirements.

(a) A majority of the board of directors shall constitute a quorum for the transaction of business of the authority. However, any action with respect to any project of the authority must be approved by the affirmative vote of not less than a majority of the directors.

(b) A majority of the regional jail authority management committee shall constitute a quorum for the transaction of business of the management committee. (Code 1981, § 42-4-96, enacted by Ga. L. 1995, p. 292, § 1.)

42-4-97. Powers of authority.

Each authority shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the foregoing, the power:

(1) To bring and defend actions except to the extent the authority has governmental immunity, venue being located in the host county

of any project of the authority. The authority shall have no governmental immunity against suits by bondholders or their investors;

(2) To adopt and amend the corporate seal;

(3) To acquire, construct, improve, or modify, to place into operation, or to operate or cause to be placed in operation and operated, a jail or jails within the counties in which the authority is activated and subject to execution of agreements with appropriate political subdivisions affected within other counties or municipalities and to pay all or part of the cost of any such jail or jails from the proceeds of revenue bonds of the authority or from any contribution or loan by persons, firms, or corporations or from any other contribution or use fees, all of which the authority is authorized to receive, accept, and use;

(4) To acquire, in its own name, by purchase on such terms and conditions and in such manner as it may deem proper, or by condemnation in accordance with any and all laws applicable to the condemnation of property for public use, or by gift, grant, lease, or otherwise, real property or rights and easements therein and franchises and personal property necessary or convenient for its corporate purposes, which purposes shall include, but shall not be limited to, the constructing or acquiring of a jail or jails; the improving, extending, adding to, reconstructing, renovating, or remodeling of any jail or jails or parts thereof already constructed or acquired; or the demolition to make room for such jail or any part thereof and to insure the same against any and all risks as such insurance may, from time to time, be available. The authority may also use such property and rent or lease the same to or from others or make contracts with respect to the use thereof or sell, lease, exchange, transfer, assign, pledge, or otherwise dispose of or grant options for any such property in any manner which the authority deems to the best advantage of itself and its purposes, provided that the powers to acquire, use, and dispose of property as set forth in this paragraph shall include the power to acquire, use, and dispose of any interest in such property, whether divided or undivided, which acquisition may result in the ownership of such property or any part thereof in common with any other party or parties, public or private;

(5) To make contracts and leases and to execute all instruments necessary or convenient, including contracts for construction of jails and leases of jails or contracts with respect to the use of jails which it causes to be acquired or constructed on a negotiated basis without competitive bid, provided that all private persons, firms, and corporations, this state, and all political subdivisions, departments, instrumentalities, or agencies of the state or of local government are authorized to enter into contracts, leases, or agreements with the authority, upon such terms and for such purposes as they deem

advisable; and, without limiting the generality of the provisions of this paragraph, authority is specifically granted to municipal corporations and counties and to the authority to enter into contracts, lease agreements, or other undertakings relative to the furnishing of project activities and facilities or either of them by the authority to such municipal corporations and counties and by such municipal corporations and counties to the authority for a term not exceeding 50 years;

(6) To exercise any one or more of the powers, rights, and privileges conferred by this Code section either alone or jointly or in common with one or more other public or private parties. In any such exercise of such powers, rights, and privileges jointly or in common with others with respect to the construction, operation, and maintenance of jail facilities, the authority may own an undivided interest in such facilities with any other party with which it may jointly or in common exercise the rights and privileges conferred by this article and may enter into an agreement or agreements with respect to any such jail facility with the other party or parties participating therein; and such agreement may contain such terms, conditions, and provisions, consistent with this article, as the parties thereto shall deem to be in their best interests, including, but not limited to, provisions for the construction, operation, and maintenance of such jail facility by any one or more of the parties to such agreement, which party or parties shall be designated in or pursuant to such agreement as agent or agents on behalf of itself and one or more of the other parties thereto, or by such other means as may be determined by the parties thereto, and including provisions for a method or methods of determining and allocating, among or between the parties, costs of construction, operation, maintenance, renewals, replacements, improvements, and disposal with respect to such facility, such agent shall be governed by the laws and regulations applicable to such agent as a separate legal entity and not by any laws or regulations which may be applicable to any of the other participating parties; provided, however, the agent shall act for the benefit of the public. Notwithstanding anything contained in any other law to the contrary, pursuant to the terms of any such agreement, the authority may delegate its powers and duties with respect to the construction, operation, and maintenance of such facility to the party acting as agent; and all actions taken by such agent in accordance with the provisions of such agreement may be binding upon the authority without further action or approval of the authority;

(7) To accept, receive, and administer gifts, grants, appropriations, and donations of money, materials, and property of any kind, including loans and grants from the United States, this state, a unit of local government, or any agency, department, authority, or instrumental-

ity of any of the foregoing, upon such terms and conditions as the United States, this state, a unit of local government, or such agency, department, authority, or instrumentality shall impose; to administer trusts; and to sell, lease, transfer, convey, appropriate, and pledge any and all of its property and assets;

(8) To do any and all things necessary or proper for the accomplishment of the objectives of this article and to exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and laws of this state, including the power to employ professional and administrative staff and personnel by and through the management committee and to retain legal, engineering, fiscal, accounting, and other professional services; the power to purchase all kinds of insurance, including, without limitation, insurance against tort liability and against risks of damage to property; the power to borrow money for any of the corporate purposes of the authority; the power to indemnify and hold harmless any parties contracting with the authority or its agents from damage to persons or property; and the power to act as self-insurer with respect to any loss or liability; provided, however, that obligations of the authority other than revenue bonds, for which provision is made in this article, shall be payable from the general funds of the authority and shall not be a charge against any special fund allocated to the payment of revenue bonds;

(9) To borrow money and issue its revenue bonds and bond anticipation notes from time to time and to use the proceeds thereof for the purpose of paying all or part of the cost of any jail, including the cost of extending, adding to, or improving such jail, or for the purpose of refunding any such bonds of the authority theretofore issued; and otherwise to carry out the purposes of this article and to pay all other costs of the authority incident to, or necessary and appropriate to, such purposes, including the provision of funds to be paid into any fund or funds to secure such bonds and notes, provided that all such bonds and notes shall be issued in accordance with the procedures and subject to the limitations set forth in Code Section 42-4-100; and

(10) To fix rentals and other charges which any user shall pay to the authority for the use of a jail or part or combination thereof, and to charge and collect the same, and to lease and make contracts with political subdivisions and agencies with respect to the use of any part of any jail or jails. Such rentals and other charges shall be so fixed and adjusted with respect to the aggregate thereof from the jail or any part thereof so as to provide a fund with other revenues of such jail, if any, to pay the cost of maintaining, repairing, and operating the jail, including reserves for extraordinary repairs and insurance,

unless such cost shall be otherwise provided for, which costs shall be deemed to include the expenses incurred by the authority on account of the jail for water, light, sewer, and other services furnished by other facilities at such jail. (Code 1981, § 42-4-97, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 6; Ga. L. 1997, p. 143, § 42.)

42-4-98. Duties and responsibilities of sheriffs and governing bodies imposed upon management committee and authority.

(a) Every duty and responsibility of the sheriff of a participant county to operate a jail in an efficient and orderly manner is imposed upon the management committee and to that extent the sheriff of a participant county is relieved of those duties with respect to the operation of a jail including specifically, but without limitation, Code Section 15-16-24 and this chapter.

(b) Every duty and responsibility of the governing body of a participant county to erect, repair, and furnish a jail in an efficient and orderly manner is imposed on the authority as provided in the agreement between the participating government and the authority and to that extent the county is relieved, including specifically but without limitation, of those duties imposed by Code Sections 36-9-5 through 36-9-11, with respect to jails. The authority shall adopt a budget for the operation of the jail that reasonably and adequately provides for the personnel, training of personnel, equipment, facilities, and other items necessary for the management committee to operate the jail. The authority shall hold budget hearings not less than 120 days prior to the adoption of the budget. (Code 1981, § 42-4-98, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1997, p. 143, § 42.)

42-4-99. Limitation on liability of members, officers, or employees.

Except for willful or wanton misconduct, neither the members of the authority nor any officer or employee of the authority, acting on behalf thereof and while acting within the scope of his or her responsibilities, shall be subject to any liability resulting from:

(1) The design, construction, ownership, maintenance, operation, or management of a jail or jails; or

(2) The carrying out of any of the discretionary powers or duties expressly provided for in this article. (Code 1981, § 42-4-99, enacted by Ga. L. 1995, p. 292, § 1.)

42-4-100. Bonds or other obligations; requirements and procedure for issuance.

(a) Subject to the limitations and procedures provided by this Code section, the obligations of any authority evidenced by bonds, bond anticipation notes, trust indentures, deeds to secure obligations, security agreements, or mortgages executed in connection therewith may contain such provisions not inconsistent with law as shall be determined by the board of directors of the authority. The authority, in such instruments, may provide for the pledging of all or any part of its revenues, income, or charges and for the mortgaging, encumbering, or conveying of all or any part of its real or personal property; may covenant against pledging any or all of its revenues, income, or charges; and may further provide for the disposition of proceeds realized from the sale of any bonds and bond anticipation notes, for the replacement of lost, destroyed, stolen, or mutilated bonds and notes, and for the payment and redemption of such bonds and notes. Similarly, subject to the limitations and procedures of this Code section, undertakings of any authority may prescribe the procedure by which bondholders and noteholders may enforce rights against the authority and provide for rights upon breach of any covenant, condition, or obligation of the authority. Bonds, resolutions, trust indentures, mortgages, or deeds to secure obligations executed by an authority and bond anticipation notes executed by an authority may contain such provisions not otherwise contrary to law as the authority shall deem necessary or desirable.

(b) The proceeds derived from the sale of all bonds and bond anticipation notes issued by an authority shall be held and used for the ultimate purpose of paying, directly or indirectly as permitted in this article, all or part of the cost of any jail, including the cost of extending, financing, adding to, or improving such jail, or for the purpose of refunding any bond anticipation notes issued in accordance with this article or refunding any previously issued bonds of the authority.

(c) All bonds and bond anticipation notes issued by an authority shall be revenue obligations of such authority and may be made payable out of any revenues or other receipts, funds, or moneys of the authority, subject only to any agreements with the holders of other bonds or bond anticipation notes or to particular security agreements pledging any particular revenues, receipts, funds, or moneys.

(d) Issuance by an authority of one or more series of bonds or bond anticipation notes for one or more purposes shall not preclude it from issuing other bonds or notes in connection with the same jail or with any other jails, but the proceeding wherein any subsequent bonds or bond anticipation notes shall be issued shall recognize and protect any prior pledge or mortgage made in any prior security agreement or made

for any prior issue of bonds or bond anticipation notes, unless in the resolution authorizing such prior issue the right is expressly reserved to the authority to issue subsequent bonds or bond anticipation notes on a parity with such prior issue.

(e) An authority shall have the power and is authorized, whenever revenue bonds of the authority have been validated as provided in this article, to issue, from time to time, its notes in anticipation of the issuance of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, whether the notes to be renewed have or have not matured. The authority may issue notes only to provide funds which would otherwise be provided by the issuance of the bonds as validated. The notes may be authorized, sold, executed, and delivered in the same manner as bonds. As with its bonds, the authority may sell such notes at public or private sale. Any resolution or resolutions authorizing notes of the authority or any issue thereof may contain any provision which the authority is authorized to include in any such resolution or resolutions; and the authority may include in any notes any terms, covenants, or conditions which it is authorized to include in any bonds. Validation of such bonds shall be a condition precedent to the issuance of the notes, but it shall not be required that such notes be judicially validated. Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued.

(f) The interest rate on or rates to be borne by any bonds, notes, or other obligations issued by the authority shall be fixed by the board of directors of the authority. Any limitation with respect to interest rates found in Article 3 of Chapter 82 of Title 36 or in the usury laws of this state shall not apply to obligations issued under this article.

(g) All revenue bonds issued by an authority under this article will be issued and validated under and in accordance with Article 3 of Chapter 82 of Title 36, except as provided in subsection (f) of this Code section and except as specifically set forth below:

(1) Revenue bonds issued by an authority shall be fully registered and shall be subject to such exchangeability and transferability provisions as the bond resolution authorizing the issuance of such bonds or any indenture or trust agreement may provide;

(2) Revenue bonds shall bear a certificate of validation. The signature of the clerk of the superior court of the judicial circuit in which the issuing authority is located may be made on the certificate of validation of such bonds by facsimile or by manual execution, stating the date on which such bonds were validated; and such entry shall be original evidence of the fact of judgment and shall be received as original evidence in any court in this state; and

(3) In lieu of specifying the rate or rates of interest which revenue bonds to be issued by an authority are to bear, the notice to the district attorney or the Attorney General and the notice to the public of the time, place, and date of the validation hearing may state that the bonds, when issued, will bear interest at a rate not exceeding a maximum per annum rate of interest specified in such notes or, in the event the bonds are to bear different rates of interest for different maturity dates, that none of such bonds shall bear interest at such rate or rates without regard to any limitation contained in any other statute or law of this state; provided, however, that nothing contained in this paragraph shall be construed as prohibiting or restricting the right of the authority to sell such bonds at a discount, even if in so doing the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in such notices.

(h) The term "cost of project" shall have the meaning prescribed in paragraph (2) of Code Section 42-4-92 whenever referred to in bond resolutions of an authority, bonds, and bond anticipation notes issued by an authority, or notices and proceedings to validate such bonds. (Code 1981, § 42-4-100, enacted by Ga. L. 1995, p. 292, § 1.)

42-4-101. Bonds or other obligations not indebtedness of state or political subdivision; payment.

No bonds or other obligations of and no indebtedness incurred by any authority shall constitute an indebtedness or obligation of the State of Georgia or of any county, municipal corporation, or political subdivision thereof, nor shall any act of any authority in any manner constitute or result in the creation of an indebtedness of this state or of any such county, municipal corporation, or political subdivision. However, provisions of this Code section shall not preclude counties, municipal corporations, or other political subdivisions from choosing to guarantee the bonds, indebtedness, or other obligations of a jail authority as part of its demonstration of adequate financial responsibility pursuant to this article. All such bonds and obligations shall be payable solely from the revenues therein pledged to such payment, including pledged rentals, sales proceeds, insurance proceeds, and condemnation awards; and no holder or holders of any such bond or obligation shall ever have the right to compel any exercise of the taxing power of this state or of any county, municipal corporation, or political subdivision thereof or to enforce the payment thereof against any property of the state or of any such county, municipal corporation, or political subdivision. (Code 1981, § 42-4-101, enacted by Ga. L. 1995, p. 292, § 1.)

42-4-102. Construction of article; bonds not subject to regulation under Georgia Uniform Securities Act; power of counties and municipalities to activate authorities.

(a) This article shall be liberally construed to effect the purposes hereof. Sale or issuance of bonds by any authority shall not be subject to regulation under Chapter 5 of Title 10, the "Georgia Uniform Securities Act of 2008," or any other law.

(b) A county or any number of counties or a municipality or any number of municipalities shall have the right to activate any authority under this article, notwithstanding the existence of any other authority having similar powers or purposes within the county or a municipal corporation created pursuant to any general law or amendment to the Constitution of this state. However, nothing in this article shall be construed as repealing, amending, superseding, or altering the organization of or abridging the powers of such authorities as are now in existence. (Code 1981, § 42-4-102, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 7; Ga. L. 2008, p. 381, § 10/SB 358.)

42-4-103. Operation and finance agreement required; withdrawal from authority.

(a) Failure of a participant county or participant municipality to execute an operation and finance agreement duly adopted by the authority at a regularly scheduled meeting or a meeting called for that purpose within 60 days after such agreement has been executed by two or more participant counties or participant municipalities shall constitute a withdrawal from the authority.

(b) Any participant county or participant municipality may withdraw from the authority subject to any contract, obligation, or agreement with the authority, but no participant county or participant municipality shall be permitted to withdraw from any authority after any obligation has been incurred by the authority. The governing body of the participant county or participant municipality wishing to withdraw from an existing authority shall signify its desire by resolution or ordinance. (Code 1981, § 42-4-103, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 8.)

42-4-104. Authority of county or municipality to establish and maintain jail or jail-holding facility.

Notwithstanding anything contained in this article, no participant county or participant municipality shall be prohibited from establishing and maintaining any jail or jail-holding facility. Notwithstanding any other provision in this chapter, such jails shall be operated as provided

in the laws of this state as if the county or municipality was not a participant in the regional jail authority. (Code 1981, § 42-4-104, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 9.)

42-4-105. Immunity of authorities from liability.

Regional jail authorities shall be carrying out an essential governmental function on behalf of participant counties or participant municipalities and are, therefore, given immunity from liability for carrying out their intended functions. (Code 1981, § 42-4-105, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 10.)

CHAPTER 5

CORRECTIONAL INSTITUTIONS OF STATE AND COUNTIES

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- supplied by inmates; penalties for breach; classified nature of department investigation reports; confidentiality of certain identifying information; custodians of records.
- 42-5-37. Employees in control of inmates prohibited from receiving profit from inmate labor; penalties.
- 42-5-37.1. Compensation of employees of institutions operated by department for damages to wearing apparel caused by inmate action.
- 42-5-38. Making false statement as to age to procure employment.
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- 42-5-41. Compensation of department employee injured by inmate or probationer [Repealed].

Article 3

Conditions of Detention Generally

- 42-5-50. Transmittal of information on convicted persons; place of detention; payment for inmates not transferred to the custody of the department; notice in the event of convicted person free on bond pending appeal.
- 42-5-51. Jurisdiction over certain misdemeanor offenders; designation of place of confinement of inmates; reimbursement of county; transfer of inmates to federal authority.
- 42-5-52. Classification and separation of inmates generally; placement of juvenile offenders and of females; transfer of mentally diseased, alcoholic, drug addicted, or tubercular inmates.
- 42-5-52.1. Submission to HIV test; separate housing for HIV infected persons.
- 42-5-52.2. Testing of prison inmates for

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- HIV; consolidation of inmates testing positive.
- 42-5-53. Establishment of county correctional institutions; supervision by department; quota of inmates; funding; confinement and withdrawal of inmates.
- 42-5-54. Information from inmates relating to medical insurance; provision and payment of medical treatment for inmates.
- 42-5-55. Deductions from inmate accounts for payment of certain damages and medical costs; limit on deductions; fee for managing inmate accounts.
- 42-5-56. Visitation with minors by convicted sexual offenders.
- 42-5-57. Institution of rehabilitation programs; provision of opportunities for educational, religious, and recreational activities.
- 42-5-58. Prohibition against corporal punishment; use of handcuffs, leg chains, and other restraints; permissible punishment generally.
- 42-5-59. Employment of inmates in the local community.
- 42-5-60. Hiring out of inmates; participation of inmates in programs of volunteer service; sale of products produced by inmates; disposition of proceeds; payment to inmates for services.
- 42-5-60.1. Utilization of inmates of county correctional institutions for work on outdoor assignments during inclement weather; supervision of inmates.
- 42-5-61. Services and benefits to be furnished inmates discharged by department or county correctional institutions.
- 42-5-62. Forfeiture of contraband.
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- 42-5-64. Educational programming.
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Article 4

Granting Special Leaves, Emergency Leaves, and Limited Leave Privileges

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- 42-5-80. Authorization and general procedure for granting special leave.
- 42-5-81. Issuance of special leave; filing.
- 42-5-82. Purposes for which special leave may be granted.
- 42-5-83. Emergency leaves.
- 42-5-84. Delegation of authority to issue limited leave privileges; records.
- 42-5-85. Leave privileges of inmates serving murder sentences.

Article 5

Awarding Earned-time Allowances

- 42-5-100. Termination of board's power

Sec.

to award earned-time allowances.

- 42-5-101. Work incentive credits.

Article 6

Voluntary Labor Program

- 42-5-120. Rules and regulations; requirements.
- 42-5-121. Federal certification.
- 42-5-122. Conflicting legislation preempted.
- 42-5-123. Compensation by employers for administrative and other costs to the state.
- 42-5-124. Publicizing and inviting participation in programs; cooperation with the Department of Labor.
- 42-5-125. General applicability; exceptions.

Editor's notes. — Ga. L. 1998, p. 270, § 13, not codified by the General Assembly, provides: "The General Assembly recognizes that criminal street gangs have succeeded at times in maintaining their structure, organization, and discipline in penal institutions and have continued to conduct criminal activities while incarcerated. Therefore, the General Assembly requests and encourages state and local officials with responsibility for the opera-

tion of adult and juvenile penal institutions and related facilities to develop policies and procedures which will identify members of criminal street gangs and, where necessary, to separate members and associates of the same criminal street gang in order that such gang members cannot maintain the gang's structure, organization, and discipline and will have a more difficult time in conducting criminal activities while incarcerated in this state."

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Escape of person in lawful custody, and as to assault on, resistance to, or other action against officer or guard within penal institution, § 16-10-52 et seq.

Editor's notes. — By resolution (Ga. L. 1987, p. 3550), the General Assembly directed the Board of Corrections to designate the correctional facility in Forsyth, Monroe County, Georgia, as the "A.L. 'Al' Burruss Correctional Training Center" and to affix an appropriate plaque at the entrance to that center indicating that designation.

By resolution (Ga. L. 1988, p. 334), the General Assembly designated the correctional facility in Pennville, Chattooga County, Georgia, as the "Forest Hays, Jr., Correctional Institution."

By resolution (Ga. L. 1988, p. 1470), the General Assembly created the Commission on Criminal Sanctions and Correctional Facilities, to be abolished January 1, 1990.

By resolution (Ga. L. 1991, p. 1203), the General Assembly designated the probation detention center in Fulton County,

Georgia as the "J. Carrell Larmore Probation Detention Center."

By resolution (Ga. L. 1992, p. 3109), the General Assembly designated the correc-

tional institution in Mitchell County as the "Jimmy Autry Correctional Institution."

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 12, 13, 20-22.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 6-8, 11-16.

ALR. — Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

State prisoner's right to personally appear at civil trial to which he is a party — state court cases, 82 ALR4th 1063.

Propriety of telephone testimony or hearings in prison proceedings, 9 ALR5th 451.

42-5-1. Definitions.

As used in this chapter, the term:

- (1) "Board" means the Board of Corrections.
- (2) "Commissioner" means the commissioner of corrections.
- (3) "Department" means the Department of Corrections. (Code 1981, § 42-5-1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

Cross references. — Notification to Department of Corrections, Uniform Superior Court Rules, Rule 35.1.

was created as part of the Code revision and was thus enacted by Ga. L. 1981, Ex. Sess., p. 8 (Code enactment Act).

Editor's notes. — This Code section

42-5-2. Responsibilities of governmental unit with custody of inmate; costs of emergency and follow-up care; access to medical services or hospital care; hospital requirements for providing emergency health care services to state inmates.

(a) Except as provided in subsection (b) of this Code section, it shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention; to defend any habeas corpus or other proceedings instituted by or on behalf of the inmate; and to bear all expenses relative to any escape and recapture, including the expenses of extradition. Except as provided in subsection (b) of this Code section, it shall be the responsibility of the department to bear the costs of any reasonable and necessary emergency medical and hospital care which is provided to any inmate after the receipt by the department of the notice provided by subsection (a) of Code Section 42-5-50 who is in the physical custody of any other political subdivision or governmental agency of this state,

except a county correctional institution, if the inmate is available and eligible for the transfer of his custody to the department pursuant to Code Section 42-5-50. Except as provided in subsection (b) of this Code section, the department shall also bear the costs of any reasonable and necessary follow-up medical or hospital care rendered to any such inmate as a result of the initial emergency care and treatment of the inmate. With respect to state inmates housed in county correctional institutions, the department shall bear the costs of direct medical services required for emergency medical conditions posing an immediate threat to life or limb if the inmate cannot be placed in a state institution for the receipt of this care. The responsibility for payment will commence when the costs for direct medical services exceed an amount specified by rules and regulations of the Board of Corrections. The department will pay only the balance in excess of the specified amount. Except as provided in subsection (b) of this Code section, it shall remain the responsibility of the governmental unit having the physical custody of an inmate to bear the costs of such medical and hospital care, if the custody of the inmate has been transferred from the department pursuant to any order of any court within this state. The department shall have the authority to promulgate rules and regulations relative to payment of such medical and hospital costs by the department.

(b)(1) The officer in charge will provide an inmate access to medical services or hospital care and may arrange for the inmate's health insurance carrier to pay the health care provider for the services or care rendered as provided in Article 3 of Chapter 4 of this title.

(2) With respect to an inmate covered under Article 3 of Chapter 4 of this title, the costs of any medical services, emergency medical and hospital care, or follow-up medical or hospital care as provided in subsection (a) of this Code section for which a local governmental unit is responsible shall mean the costs of such medical services and hospital care which have not been paid by the inmate's health insurance carrier or the Department of Community Health.

(c) A hospital authority or hospital which is not a party to a contract with the Georgia Department of Corrections or its agents on July 1, 2009, shall be reimbursed no more than the applicable Georgia Medicaid rate for emergency services provided to such state inmate. For purposes of this subsection, the term "state inmate" means any inmate for whom the Georgia Department of Corrections shall be responsible for the payment of medical care thereof. Nothing in this Code section shall prohibit the Georgia Department of Corrections from negotiating higher fees or rates with health care providers. It is the intent of the General Assembly that the Georgia Department of Corrections or its agents enter into negotiations with health care providers to contract for

the provision of services as provided in this Code section. (Ga. L. 1956, p. 161, § 13; Ga. L. 1982, p. 1361, §§ 1, 2; Ga. L. 1983, p. 3, § 31; Ga. L. 1986, p. 493, § 1; Ga. L. 1992, p. 2125, § 3; Ga. L. 1999, p. 296, § 24; Ga. L. 2009, p. 136, § 1A/HB 464.)

Cross references. — Habeas corpus generally, T. 9, C. 14.

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992).

For note, "Finding Immunity: Manders v. Lee and the Erosion of 1983 Liability," see 55 Mercer L. Rev. 1505 (2004).

JUDICIAL DECISIONS

Extent of duty. — O.C.G.A. §§ 42-4-4 and 42-5-2 create an obligation merely to provide inmates with access to medical care and the county met that obligation by contracting with a local medical services provider to provide medical care to the detention center. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

When officers arrested a decedent who died shortly after the arrest, the officers and a city could not be held liable for violating O.C.G.A. § 42-4-4 or O.C.G.A. § 42-5-2 or by denying the decedent medical care because: (1) Code Section 42-4-4 imposed a duty only upon sheriffs and deputies; (2) Code Section 42-5-2 imposed a duty only on a governmental unit having physical custody of a detainee; and (3) the decedent was taken into custody by a county police officer and transported to a county jail, so the decedent was never in the custody of the city, and the suit could not be brought against the city under § 42-5-2. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

County was responsible for detainee's medical care after the detainee was injured while being taken into custody by the county sheriff's department and, but for the seriousness of the detainee's injuries, would have been placed in the county's detention facility. *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

Violation of prisoner's constitutional rights. — When medical policies were promulgated and carried out under the mandate of O.C.G.A. § 42-5-2 and the

seriously ill prisoner was seen only by undertrained LPNs, not by a physician, before the prisoner died, this was a violation of a constitutional right that was coupled with causation. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Use of prisoners' funds for medical expenses. — As it is the city's responsibility to pay all medical and hospital expenses for a prisoner in the city's custody, using a fund recovered from the prisoner after a shoot-out to pay these expenses, the city, in effect, appropriated the entire fund to itself. *Johnson v. Mayor of Carrollton*, 249 Ga. 173, 288 S.E.2d 565 (1982) (decided prior to 1982 amendment, which added last four sentences).

Department's right to recover from third-party tortfeasor. — Although plaintiff Department of Corrections had a duty under O.C.G.A. § 42-5-2(a) to provide medical care to the Department's inmates, this duty did not absolve the defendant driver of the driver's alleged liability for causing the inmates' injuries in an automobile accident; thus, the trial court erred in granting the driver summary judgment in the Department's suit against the driver to recover the Department's expenses incurred in treating the inmates' injuries. *Dep't of Corr. v. Barkwell*, 256 Ga. App. 877, 570 S.E.2d 13 (2002).

Charged detainees are inmates. — Term "inmate" means not only a person who has been convicted of an offense, but also a person who has been detained by reason of being charged with a crime, such

that the county was responsible for the medical expenses of an individual arrested and charged with theft, regardless of the person's procedural status, and, additionally, of the self-inflicted nature of the person's injuries. *Macon-Bibb County Hosp. Auth. v. Houston County*, 207 Ga. App. 530, 428 S.E.2d 374 (1993).

Handcuffing of persons taken to hospital. — In an action by a hospital seeking to recover the expenses of medical treatment provided to three men brought to the hospital by a county sheriff's deputy, the fact that the three men had been handcuffed for transportation to the hospital was not determinative of their subsequent status, when the handcuffs were removed. *Macon-Bibb County Hosp. Auth. v. Reece*, 236 Ga. App. 669, 513 S.E.2d 243 (1999).

Fact issue on custody determination. — In an action by a hospital against the county seeking reimbursement for medical treatment provided detainees of the sheriff's department, issues of fact as to whether the individuals were in custody of the county when the expenses were incurred and whether the individuals were "inmates" precluded summary judgment for either the county or sheriff. *Macon-Bibb County Hosp. Auth. v. Reece*, 228 Ga. App. 532, 492 S.E.2d 292 (1997).

Sovereign immunity. — Providing adequate medical attention for inmates under the defendant's custody and control is a ministerial act by the sheriff and his or her deputies and does not involve the exercise of discretion; thus, such act is not subject to either sovereign immunity or official immunity. *Cantrell v. Thurman*, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

While subsection (a) of O.C.G.A. § 42-5-2 imposes the duty and the cost for medical care of inmates in the custody of a county upon the county, it does not waive sovereign immunity of the county or the county's agents and employees. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Without proof by the administrator of the decedent inmate's estate that any actions undertaken by the county officers and employees sued for wrongful death

amounted to wilfulness, malice, or corruption, they were entitled to official immunity as a matter of law; further, any failure to adopt other or additional requirements as to their policies of supervision and training in dealing with a suicidal inmate did not amount to wilfulness, malice, or corruption. *Middlebrooks v. Bibb County*, 261 Ga. App. 382, 582 S.E.2d 539 (2003).

Trial court incorrectly denied a prison official's motion for summary judgment on the estate administrators' 42 U.S.C. § 1983 claim against the official, following an inmate's death from a Tylenol overdose, because, while the official was aware that the decedent faced a substantial risk of serious harm, the administrators did not show that the official displayed deliberate indifference to the decedent's serious medical needs. Furthermore, the administrators failed to prove that the official was acting outside the scope of the person's official duties or employment; consequently, even if the official acted with malice or intent to injure the decedent, the official was immune from liability on the administrators' state law claims against the official. *Minor v. Barwick*, 264 Ga. App. 327, 590 S.E.2d 754 (2003).

County sheriff was not entitled to Eleventh Amendment immunity because, under Georgia law, the sheriff was not acting as an arm of the state when caring for the medical needs of an inmate; instead, the sheriff was carrying out a statutory duty assigned to the county under O.C.G.A. § 42-5-2(a). *Dukes v. State*, 428 F. Supp. 2d 1298 (N.D. Ga. 2006), aff'd, 212 Fed. Appx. 916 (11th Cir. 2006).

In a parent's wrongful death action, the trial court erred in denying a county's motion for summary judgment because O.C.G.A. § 42-5-2 did not waive the county's sovereign immunity for claims based on failure to provide medical care; Code Section 42-5-2 does not provide an express waiver, and nothing in the statute can be read to imply a waiver. *Gish v. Thomas*, 302 Ga. App. 854, 691 S.E.2d 900 (2010).

Trial court correctly determined that the state law claims made against a county and against a sheriff and medical contract compliance administrator in their official capacities were barred be-

cause although O.C.G.A. § 42-5-2(a) imposed upon the county the duty and cost of medical care for inmates in the county's custody, the county did not waive sovereign immunity of the county or the county's agents or employees. *Graham v. Cobb County*, 316 Ga. App. 738, 730 S.E.2d 439 (2012).

Duty held ministerial. — City's and police chief's provision of medical care to a diabetic inmate in their custody was a ministerial act and, because it was a ministerial act, sovereign immunity was waived pursuant to O.C.G.A. § 36-33-1(b). *City of Atlanta v. Mitcham*, 325 Ga. App. 481, 751 S.E.2d 598 (2013).

In a negligence action filed by an inmate based on the city's and the police chief's failure to provide medical care to the inmate, because the provision of medical care to inmates in the city's and the police

chief's custody was a ministerial act, as the duty was imposed by statute, and medical care was a fundamental right of inmates in custody, sovereign or governmental immunity was not applicable, and the trial court did not err by denying the city's and the police chief's motion to dismiss for failure to state a claim based on sovereign immunity. *City of Atlanta v. Mitcham*, 2013 Ga. App. LEXIS 963 (Nov. 20, 2013).

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *McKenney v. State*, 140 Ga. App. 402, 231 S.E.2d 149 (1976); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Bunyon v. Burke County*, 306 F. Supp. 2d 1240 (S.D. Ga. 2004); *Lawson v. Lincoln County*, 292 Ga. App. 527, 664 S.E.2d 900 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — Most of the following annotations were taken from opinions rendered prior to the 1982 amendment of this section, which added the last four sentences of subsection (a).

Responsibility for medical bills accrued for treatment. — See 1986 Op. Att'y Gen. No. U86-23.

Medical bills arising from injury of work release inmate. — Private employer is primarily responsible for payment of medical bills arising from injuries, fatal or otherwise, received by a work release inmate while on the job, but upon default by employer, the Department of Offender Rehabilitation (Corrections) is ultimately responsible for paying for those medical services. 1981 Op. Att'y Gen. No. 81-27.

Medical care and expenses of escaped prisoners. — Board may pay only those medical expenses incurred by an escaped prisoner, as a result of the prisoner's wrecking a stolen automobile, which may properly be classified as an expense relating to the recapture of the prisoner. 1967 Op. Att'y Gen. No. 67-218.

Responsibility for providing medical and dental care rests upon the governmental unit having physical custody of an inmate; there is, however, no statutory

prohibition against taking an inmate to the inmate's private physician or dentist for specialized treatment at the expense of the inmate; however, while the Board of Corrections may permit an inmate to receive private specialized treatment, the inmate has no right to demand that the board permit such treatments. 1967 Op. Att'y Gen. No. 67-336.

Liability for medical expenses depends upon physical custody. — Municipality is only liable for a prisoner's medical expenses incurred while the prisoner is in the physical custody of the municipality. 1990 Op. Att'y Gen. No. U90-8.

When custody of a prisoner ceases by virtue of the prisoner's posting an appearance bond, the municipality's responsibility for needed medical care and hospital attention ceases. At that point the municipality ceases to have physical custody of the individual, since the individual is free to leave at any time the individual desires. 1990 Op. Att'y Gen. No. U90-8.

Chiropractic aid. — There is no prohibition against chiropractic aid to prisoners; however, such should be furnished only upon request of the prisoner. 1960-61 Op. Att'y Gen. p. 357.

Medical expenses of assignees to medical centers. — Board is liable for

medical expenses of probationers and parolees assigned to community centers operated by the board. 1974 Op. Att'y Gen. No. 74-129.

Medical expenses of woman resulting from assault and rape by escaped prisoner. — Board may not pay the medical expenses of an 83-year-old woman who was assaulted and raped by an escaped inmate from the Georgia Industrial Institute. 1967 Op. Att'y Gen. No. 67-301.

Defense of habeas corpus proceeding. — Governmental unit having physical custody of prisoner is required to defend any habeas corpus proceeding, including an appeal therefrom; it is the responsibility of the attorney representing the governmental unit having physical custody of a prisoner to defend the appeal in the Supreme Court of this state. 1969 Op. Att'y Gen. No. 69-39.

Responsibility for extradition proceedings expenses. — There is an initial responsibility for payment of expenses incurred by an agency within the executive authority of this state initiating extradition proceedings, and that agency is under an obligation to secure the indemnification of the funds which it was obligated to expend relative to the escape of a prisoner from the county having physical custody of the prisoner at the time of the escape. 1970 Op. Att'y Gen. No. 70-13.

Responsibility for asylum expenses of escaped fugitive. — Ultimate responsibility for bearing the expenses incurred in the asylum state attending upon the arrest and delivery of the escaped fugitive rests with the governmental unit having the physical custody of the prisoner. 1970 Op. Att'y Gen. No. 70-13.

RESEARCH REFERENCES

ALR. — What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

Right of state prison authorities to ad-

minister neuroleptic or antipsychotic drugs to prisoner without his or her consent — state cases, 75 ALR4th 1124.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

Constitutional right of prisoners to abortion services and facilities, 28 ALR6th 485.

42-5-3. Department's responsibility for trial costs and expenses.

The whole costs of the case and expenses of the trial involving an inmate of the state penal system charged with the violation of any criminal statute shall be borne by the department, provided the offense was committed by the inmate within the confines of a state correctional institution or was the crime of escape or attempted escape. The costs and expenses of the trial shall include, but shall not be limited to, the cost of the sheriff, bailiff, clerks, jurors, and jail fees and shall be paid by the department to the governing authority of the county in which the trial was conducted, for proper disposition. (Orig. Code 1863, § 4690; Code 1868, § 4714; Code 1873, § 4812; Code 1882, § 4812; Penal Code 1895, § 1174; Penal Code 1910, § 1230; Code 1933, § 77-401; Ga. L. 1964, p. 462, § 1; Ga. L. 1975, p. 1590, § 1.)

Cross references. — Payment of costs of criminal proceedings generally, T. 17, Ch. 11.

JUDICIAL DECISIONS

Fund out of which expenses paid. — No reference is made in this section or elsewhere in this Code as to the fund from which the expense is to be paid, and it

seems that the provision that the expense shall be paid out of the penitentiary fund remains unrepealed. *Campbell v. Davison*, 162 Ga. 221, 133 S.E. 468 (1926).

OPINIONS OF THE ATTORNEY GENERAL

Costs of trial conducted after discharge from custody. — Board is liable for costs of trial of former inmate in custody of department tried for crime committed while inmate was incarcerated in custody of department, but whose trial will take place after the inmate is discharged from custody. 1979 Op. Att'y Gen. No. 79-64.

Costs include incarceration in local jail during trial but not for incarceration, if any, at the local jail after the trial

and before the inmate is returned to the custody of the Department of Offender Rehabilitation (Corrections). 1979 Op. Att'y Gen. No. 79-64.

Other costs and fees department obligated to pay. — Department of Corrections is obligated to pay all costs and expenses listed on the statement submitted to the department, including court-appointed attorneys' fees and the per diem of the court reporter. 1963-65 Op. Att'y Gen. p. 743.

42-5-4. Payment of trial costs and expenses.

The clerk of the superior court from the county in which the trial specified in Code Section 42-5-3 was conducted shall submit a statement of the charges, certified by the judge of the superior court or the judge of the city court, to the department, which shall pay the charges out of the appropriations provided therefor in accordance with schedules authorized by law. (Ga. L. 1964, p. 462, § 2.)

42-5-5. Reimbursement of court costs and transportation and detention expenses incurred in trying escapees from state correctional institutions.

The department is authorized and directed to reimburse the clerk of the court for court costs incurred in trying a defendant for the crime of escape when the escape is from a state correctional institution and to reimburse the sheriff of the county wherein the trial takes place for the expense of transporting the defendant from the place of detention to court for trial and returning the defendant from the court to the place of detention, such reimbursement to be at the rate of 10¢ per mile. (Ga. L. 1971, p. 572, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Costs limited to actual costs. — This section limits payment of court costs in cases related to escapees from state institutions to actual costs incurred by the clerks of courts in which such escapees are tried; in addition, it allows reimburse-

ment to the sheriffs of the counties in which the trials take place only for the expense of transporting the defendants to and from their places of detention. 1972 Op. Att'y Gen. No. 72-43.

42-5-6. Participation by county correctional institutions in state purchasing contracts.

County correctional institutions may participate in all state purchasing contracts for the purpose of providing materials and supplies to state or county inmates. (Ga. L. 1975, p. 908, § 2.)

Cross references. — State purchasing generally, § 50-5-50 et seq.

42-5-7. Sudden or unusual death of inmate.

Whenever any inmate dies suddenly or under unusual circumstances in any correctional institution, the warden or superintendent of that institution shall immediately notify the commissioner and shall also notify the coroner of the county in which the death occurs. The warden or superintendent is also directed to furnish the department with a copy of the findings of the coroner's inquest, together with any other information available that would be of use to the commissioner in determining the cause of death. (Ga. L. 1956, p. 161, § 25.)

Cross references. — Reimbursement of counties for expenses of burial of inmates, § 36-12-5. Requirement of autopsy

and inquest upon death of inmate occurring when physician not present or as a result of violence, § 45-16-27.

OPINIONS OF THE ATTORNEY GENERAL

Notification of next of kin of inmates' death. — Neither the warden nor any staff member at the Georgia State Prison is legally required to notify the

next of kin of the death of an inmate who has been transferred to a hospital. 1967 Op. Att'y Gen. No. 67-445.

RESEARCH REFERENCES

ALR. — Liability for death or injury to prisoner, 61 ALR 569.
Liability of prison authorities for injury

to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

42-5-8. Notification upon escape of inmate.

In addition to any all-points bulletin issued by the department notifying all local law enforcement agencies within the state of the escape of any inmate from the custody of the department, the department shall also, within 72 hours of the discovery of the escape, notify all parties who in the judgment of the commissioner have a legitimate need to know that the inmate has escaped and who have requested in writing that the department notify the party prior to the inmate's release from custody. (Ga. L. 1980, p. 393, § 1; Ga. L. 1985, p. 149, § 42.)

42-5-9. Notification of projected release date of inmate.

At least 15 days prior to the projected release date of any inmate scheduled to be released pursuant to the authority of the department, the department shall notify the following persons of such projected release date by the following methods:

(1) Each district attorney and all local law enforcement agencies throughout the state by making the necessary information available on a publicly accessible website; and

(2) The presiding judge and the victims of crimes against the person by mail or electronic transmission. Notice to the victim shall only be required when the victim has provided the department with his or her current address. The notice to the victim or victims as required by the department in this Code section shall be reasonable notice and no liability or sanctions to the department related to notification or failure to notify shall lie against the department, its officers, or employees if said attempt at notice is of a reasonable effort. (Ga. L. 1980, p. 393, § 2; Ga. L. 2000, p. 1422, § 1; Ga. L. 2001, p. 4, § 42; Ga. L. 2005, p. 60, § 42/HB 95.)

42-5-10. Promulgation of rules governing plans and specifications for new correctional institutions; certification of acceptability of old facilities by state fire marshal.

The board shall prescribe by rule and regulation the required plans and specifications defining the size and type of construction and materials to be employed in constructing all state and county correctional institutions. The specifications shall require that the buildings be as nearly free from fire hazards and as nearly escape-proof as is possible under all circumstances. A certificate of approval from the state fire marshal shall be conclusive as to the acceptability of all old state or county correctional institutions from a standpoint of fire hazard. No county shall establish a county correctional institution until its establishment and the plans and specifications thereof have been approved by the board. (Ga. L. 1956, p. 161, § 17.)

OPINIONS OF THE ATTORNEY GENERAL

Dormitory standard set by board cannot fall below standard set by Safety Fire Commissioner. — The Board of Offender Rehabilitation (Corrections) has authority to require a prison

dormitory of any standard, so long as the standard is not below that set by the Georgia Safety Fire Commission (now Safety Fire Commissioner). 1954-56 Op. Att'y Gen. p. 526.

42-5-11. General prohibition against receipt of remuneration in regard to assignment, transfer, or status of inmate.

(a) It shall be unlawful for anyone other than a duly licensed attorney who is an active member in good standing of the State Bar of Georgia and who is not a member of the General Assembly to accept a fee, money, or other remuneration, other than actual expenses, for contacting, in any manner, the commissioner, any employee of the department, or any member of the board in an attempt to influence the commissioner, employee, or board member concerning a transfer of an inmate from one correctional institution to another or concerning the status and assignment of an inmate within a correctional institution.

(b) Any person who receives any fee, money, or other remuneration other than actual expenses, in violation of subsection (a) of this Code section, shall be guilty of a misdemeanor. (Ga. L. 1975, p. 1218, § 1.)

42-5-12. Receipt of remuneration by state officials in regard to assignment, transfer, or status of inmate.

(a) It shall be unlawful for members of the General Assembly or any other state elected or appointed official to accept a fee, money, or other remuneration for contacting, in any manner, the commissioner, any employee of the department, or any member of the board in an attempt to influence the commissioner, employee, or board member concerning a transfer of an inmate from one correctional institution to another or concerning the status and assignment of an inmate within a correctional institution.

(b) Nothing in this Code section shall be construed so as to prohibit:

(1) Members of the General Assembly or other state elected or appointed officials from appearing before or contacting the commissioner, employees of the department, or members of the board when their official duties require them to do so;

(2) Members of the General Assembly or other state elected or appointed officials from requesting information from and presenting information to the commissioner, employees of the department, or members of the board on behalf of constituents when no compensation, gift, favor, or anything of value is accepted, either directly or indirectly, for such services; or

(3) Members of the General Assembly or other state elected or appointed officials from contacting the commissioner, any employee of the department, or any member of the board on behalf of any person so long as there is no fee, money, or other remuneration being paid or received for such contacting.

(c) Nothing in this Code section shall be construed to apply to the acceptance of compensation, expenses, and allowances received by members of the General Assembly or any other state elected or appointed official for his duties as a member or official.

(d) Nothing contained in this Code section shall preclude any attorney from contacting a client who may be in a correctional institution or from making any reasonable contact with employees of the department to the extent that the contact with employees may be necessary to contact his client.

(e) Any person violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 1218, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Inspection of correspondence between inmate and attorney. — Prison officials may inspect correspondence between attorneys and the attorney's cli-

ents; in addition to the prisoner's general correspondence, reasonable censorship of attorney correspondence may be imposed. 1967 Op. Att'y Gen. No. 67-314.

42-5-13. Record of person contacting commissioner, department, or board on behalf of inmate.

The department shall maintain a complete written record of every person contacting the commissioner, any employee of the department, or any member of the board concerning a transfer of an inmate from one correctional institution to another or concerning the status and assignment of an inmate within a correctional institution. The record shall include the name and address of the person contacting the commissioner, employee, or board member and the reason for the contact. (Ga. L. 1975, p. 1218, § 2.)

42-5-14. Establishment of guard lines and signs at state or county correctional institutions.

Guard lines shall be established by the warden, superintendent, or his designated representative in charge at the various state or county correctional institutions in the same manner that land lines are established, except that, at each corner of the lines, signs must be used on which shall be plainly stamped or written: "Guard line of _____." Signs shall also be placed at all entrances and exits for vehicles and pedestrians at the institutions and at such intervals along

the guard lines as will reasonably place all persons approaching the guard lines on notice of the location of the institutions. (Ga. L. 1903, p. 71, § 3; Penal Code 1910, § 1231; Code 1933, § 77-403; Ga. L. 1961, p. 45, § 1.)

JUDICIAL DECISIONS

Cited in Cox Communications, Inc. v. Lowe, 173 Ga. App. 812, 328 S.E.2d 384 (1985).

42-5-15. Crossing of guard lines with weapons, intoxicants, or drugs without consent of warden or superintendent.

(a) It shall be unlawful for any person to come inside the guard lines established at any state or county correctional institution with a gun, pistol, or any other weapon or with or under the influence of any intoxicating liquor, amphetamines, biphetaamines, or any other hallucinogenic or other drugs, without the knowledge or consent of the warden, superintendent, or his designated representative.

(b) Any person who violates this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than four years. (Ga. L. 1903, p. 71, § 1; Penal Code 1910, § 1232; Code 1933, § 77-404; Ga. L. 1961, p. 45, § 1; Ga. L. 1971, p. 220, § 1.)

JUDICIAL DECISIONS

Sufficient evidence prison guard intended to distribute drugs in prison. — Evidence supported convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and crossing a prison guard line with drugs when the defendant, a corrections officer, was found with a cookie box containing drugs. Although the defendant claimed to be unaware of the contents of the package, none of the people the defendant named as being involved in the transaction were proven to exist, and the jury was authorized to infer that it was unreasonable for a corrections officer to take a suspicious package from an un-

known person into a prison to give to an unknown recipient; furthermore, given the large amount and variety of contraband, its high street value, and that the defendant was taking it inside a heavily guarded prison facility, the jury was authorized to infer that the defendant intended to distribute the drugs to others instead of using the drugs personally. Bradley v. State, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

Cited in Cox Communications, Inc. v. Lowe, 173 Ga. App. 812, 328 S.E.2d 384 (1985); Howard v. State, 185 Ga. App. 465, 364 S.E.2d 600 (1988).

OPINIONS OF THE ATTORNEY GENERAL

Correctional staff are authorized to search visitors entering or leaving correctional institutions; these searches may

be conducted by regular members of the correctional staff, properly supervised and trained; staff should conduct searches ac-

cording to clear guidelines prepared for them by the Department of Offender Re-

habilitation (Corrections). 1974 Op. Att'y Gen. No. 74-146.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 70-73.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 100-102.

42-5-16. Trading with inmates without consent of warden or superintendent.

It shall be unlawful for any person to trade or traffic with, buy from, or sell any article to an inmate without the knowledge and consent of the warden, superintendent, or the designated representative in charge. (Ga. L. 1903, p. 71, § 2; Penal Code 1910, § 1233; Code 1933, § 77-405; Ga. L. 1961, p. 45, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Paid interview with inmate. — Interview with an inmate, for which the inmate is paid, is an illegal transaction unless consummated with the knowledge and approval of the warden or deputy warden in charge of the prisoner. 1969 Op. Att'y Gen. No. 69-299.

Payment for blood collected from inmate. — Hospital may collect blood from an inmate and pay the inmate a fee for the blood with the approval of the appropriate warden or deputy warden. 1969 Op. Att'y Gen. No. 69-21.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 95.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 73.

42-5-17. Loitering near inmates after being ordered to desist.

It shall be unlawful for any person to loaf, linger, or stand around where inmates are employed or kept after having been ordered by the warden, superintendent, or designated representative in charge of the inmates to desist therefrom. (Ga. L. 1903, p. 71, § 5; Penal Code 1910, § 1234; Code 1933, § 77-406; Ga. L. 1961, p. 45, § 1.)

Cross references. — Prohibition against solicitation of business by profes-

sional bondsmen at places where prisoners are confined, § 17-6-52.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 70-76.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 100-102.

ALR. — Validity, construction, and application of loitering statutes and ordinances, 72 ALR5th 1.

42-5-18. Items prohibited for possession by inmates; warden's authorization; penalty.

(a) As used in this Code section, the term:

(1) "Inmate" means a prisoner, detainee, criminal suspect, immigration detainee, or other person held, incarcerated, or detained in a place of incarceration.

(2) "Place of incarceration" means any prison, probation detention center, jail, or institution, including any state, federal, local, or privately operated facility, used for the purpose of incarcerating criminals or detainees.

(3) "Telecommunications device" means a device, an apparatus associated with a device, or a component of a device that enables, or may be used to enable, communication with a person outside a place of incarceration, including a telephone, cellular telephone, personal digital assistant, transmitting radio, or computer connected or capable of being connected to a computer network, by wireless or other technology, or otherwise capable of communicating with a person or device outside of a place of incarceration.

(4) "Warden or superintendent" shall mean the commissioner or any warden, superintendent, sheriff, chief jailor, or other person who is responsible for the overall management and operation of a place of incarceration.

(b) It shall be unlawful for any person to obtain for, to procure for, or to give to an inmate a gun, pistol, or any other weapon; any intoxicating liquor; amphetamines, biphedamines, or any other hallucinogenic drugs or other drugs, regardless of the amount; any telecommunications device; or any other article or item without the authorization of the warden or superintendent or his or her designee.

(c) It shall be unlawful for an inmate to possess a gun, pistol, or any other weapon; any intoxicating liquor; amphetamines, biphedamines, or any other hallucinogenic drugs or other drugs, regardless of the amount; a telecommunications device; or any other item without the authorization of the warden or superintendent or his or her designee.

(d) A person who commits or attempts to commit a violation of this Code section shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years; provided, however, if a person violates this Code section while being held pursuant to an arrest or conviction for a misdemeanor offense, the possession of a telecommunications device in violation of this Code section shall be treated as a misdemeanor. (Ga. L. 1976, p. 1506, § 2; Ga. L. 1984, p. 593, § 1; Ga. L. 2008, p. 533, § 1/SB 366.)

Cross references. — Similar provisions regarding furnishing of alcoholic beverages to inmates of jails, penal insti-

tutions, correctional facilities, or other lawful places of confinement, § 3-3-25.

JUDICIAL DECISIONS

“Weapon” defined. — Jury’s finding that a “water bug” (a device used to bring a liquid to a boil), which defendant threw at correctional officers, was a “weapon,” within the meaning of subsection (b) of O.C.G.A. § 42-5-18, was not unreasonable. *Culbertson v. State*, 193 Ga. App. 9, 386 S.E.2d 894 (1989).

Evidence sufficient for conviction of possession of drugs by an inmate. *Webb v. State*, 249 Ga. App. 214, 547 S.E.2d 767 (2001).

Defendant’s conviction for the unauthorized possession of drugs by an inmate, contrary to O.C.G.A. § 42-5-18(b), was based on sufficient evidence as the evidence showed that during a confiscation and inventory of defendant’s personal possessions, before moving the defendant to a new cell, a shampoo bottle containing a substance determined to be marijuana was discovered. *Collinsworth v. State*, 276 Ga. App. 58, 622 S.E.2d 419 (2005).

Evidence insufficient to support conviction. — Defendant’s conviction for possession of drugs by an inmate in violation of O.C.G.A. § 42-5-18(c) was reversed because the state failed to present any evidence to support even an inference that the defendant had any prior knowledge of drugs that were found in a bag or any idea what was in the bag; the state failed to demonstrate that the defendant had the bag in the defendant’s possession for any reason other than the performance of the defendant’s assigned duties of cleaning the visitation lobby in the prison and, thus, failed to exclude the reasonable hypothesis that the defendant was merely performing the job when the defendant removed the bag from one trash can and placed the bag in the other. *Strozier v. State*, 313 Ga. App. 804, 723 S.E.2d 39 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Applicability. — This section is applicable only when the items referred to are obtained or procured for or given to a convict. It is not applicable if the items

referred to are obtained or procured for or given to a prisoner being held in a county jail who has not yet been convicted of any crime. 1980 Op. Att’y Gen. No. U80-12.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 73.

ALR. — Nature and elements of offense of conveying contraband to state prisoner, 64 ALR4th 902.

Validity, construction, and application of state statute criminalizing possession of contraband by individual in penal or correctional institution, 45 ALR5th 767.

42-5-19. Penalty for violating Code Section 42-5-16 or 42-5-17.

Any person who violates Code Section 42-5-16 or 42-5-17 shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years. (Ga. L. 1961, p. 45, § 1; Ga. L. 1976, p. 1506, § 1; Ga. L. 2008, p. 533, § 2/SB 366.)

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 70-76, 95.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 73, 100-102.

ALR. — Validity, construction, and application of loitering statutes and ordinances, 72 ALR5th 1.

42-5-20. Alcohol or Drug Use Risk Reduction Program.

The department shall provide within the correctional system an Alcohol or Drug Use Risk Reduction Program. The program shall be made available to every person sentenced to the custody of the state whose criminal offense or history indicates alcohol or drug involvement; provided, however, that the provisions of this Code section shall not apply to a person who has been sentenced to the punishment of death or those deemed mentally incompetent. (Code 1981, § 42-5-20, enacted by Ga. L. 1995, p. 625, § 1.)

Law reviews. — For note on the 1995 enactment of this Code section, see 12 Ga. St. U.L. Rev. 301 (1995).

42-5-21. Family Violence Counseling Program.

The department shall provide within the correctional system a Family Violence Counseling Program. The program shall be made available to every person sentenced to the custody of the state who committed an offense which has been identified to involve family violence as such term is defined in Code Section 19-13-1; provided, however, that the provisions of this Code section shall not apply to a person who has been sentenced to the punishment of death or to those deemed mentally incompetent. (Code 1981, § 42-5-21, enacted by Ga. L. 1996, p. 1113, § 1.)

ARTICLE 2

WARDENS, SUPERINTENDENTS, AND OTHER PERSONNEL

Cross references. — Indemnification of prison guards, and other personnel for death or disablement in line of duty, § 45-9-80 et seq.

42-5-30. Qualifications for wardens, superintendents, and other personnel; appointment of wardens of county correctional institutions.

The board shall by rule and regulation define the qualifications for wardens, superintendents, and other personnel employed in the state and county correctional institutions. The board shall by rule and

regulation specify appropriate titles of personnel so employed, but no such personnel shall be known as or designated by the board as "guards" or "prison guards." The wardens and deputy wardens of the various county correctional institutions shall be appointed by the governing authority of the county, subject to approval of the board, and shall serve at the pleasure of the county or the board. (Ga. L. 1956, p. 161, § 18; Ga. L. 1984, p. 639, § 1; Ga. L. 1993, p. 417, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Penal Code 1910, § 1192 are included in the annotations for this Code section.

Proceedings for removal of warden. — Proceeding before the prison commission (now Board of Corrections) for the removal of a warden is not "litigation" within the meaning of Ga. Const. 1877,

Art. VII, Sec. VI, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I). Hence, the governing authority of a county has no authority to employ an attorney to represent it in a proceeding before the prison commission (now Board of Corrections) for the discharge of a warden. *Humber v. Dixon*, 147 Ga. 480, 94 S.E. 565 (1917) (decided under former Penal Code 1910, § 1192).

OPINIONS OF THE ATTORNEY GENERAL

Ga. L. 1956, p. 161, § 18 (see now O.C.G.A. § 42-5-30) provides for two types of wardens: those at "state-operated institutions" under Ga. L. 1956, p. 161, § 10 (see now O.C.G.A. § 42-2-9) and those "appointed by the governing authority of the county," under Ga. L. 1956, p. 161, § 18; a person cannot be a warden within the state penal system unless the warden is an employee either of the state or a county authorized to maintain a county correctional institution under the supervision of the Board of Corrections. 1973 Op. Att'y Gen. No. 73-72.

Authority to issue rules establishing qualifications for wardens. — Board of Offender Rehabilitation (Corrections) has the authority to issue rules establishing the practical experience and educational background necessary for the position of warden of a county correctional institution. 1973 Op. Att'y Gen. No. 73-41.

It is within the ambit of the board to decide what is "experience" and when it is "equivalent" for purposes of satisfying educational requirements and the board may use the board's power to remove wardens and prisoners to ensure that county wardens do in fact possess the requisite qualifications. 1973 Op. Att'y Gen. No. 73-41.

Recourse when county institutions fail to hire qualified wardens. — If a county correctional institution fails to employ a warden duly qualified according to the requirements set forth by the board, the board may remove all the prisoners from that institution. 1973 Op. Att'y Gen. No. 73-41.

Eighteen-year-olds may legally be hired for correctional officers. 1974 Op. Att'y Gen. No. 74-138.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, § 162.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 13, 115.

42-5-31. Oath of office of wardens and superintendents, their deputies, and other correctional officers.

Before entering upon the duties of their office, wardens and superintendents, their deputies, and other correctional officers or employees shall take and subscribe, before some officer authorized to administer oaths, the following oath:

“I do solemnly swear (or affirm) that I will support and defend the Constitutions of the United States of America and the State of Georgia and that I will faithfully perform and discharge the duties of my office conscientiously and without malice or partiality, to the best of my ability. So help me God.” (Penal Code 1910, § 1197; Code 1933, § 77-311; Ga. L. 1968, p. 1155, § 1; Ga. L. 1984, p. 639, § 2.)

JUDICIAL DECISIONS

Liability for acts committed by convicts. — Warden of a public works camp (now county correctional institution) will not be held liable for torts of convicts on mere averment that the warden was negligent “in permitting said convicts to roam the roads of county and state in a truck, without any guard,” whereby injuries resulted from a collision of the truck with the plaintiff’s car, as it was discretionary with the warden to determine how and in what manner convicts employed outside confines of the camp (now county correctional institution) doing work in connection with the operation should be allowed to go at large, and wardens acting in a discretionary capacity will not be liable unless guilty of willfulness, fraud, malice, or corruption, or unless they knowingly act wrongfully, and not according to their honest convictions of duty. *Price v. Owen*, 67 Ga. App. 58, 19 S.E.2d 529 (1942) (decided under former Code 1933, §§ 77-307, 77-311, and 77-313).

Cited in *Cleveland v. State*, 260 Ga. 770, 399 S.E.2d 472 (1991); *Bradley v. State*, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Oaths and Affirmations, §§ 4, 6, 7.
ALR. — Liability of prison authorities

for injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

42-5-32. Bonds of superintendents, wardens, and other officials and employees.

(a) Before any state or county correctional institution or other facility operating under the jurisdiction of the board shall be approved to receive inmates, the board shall require the warden, superintendent, or other chief custodial officer of the institution to execute a bond, in an amount as the board may require, with good securities to be approved by it, such bond to be not less than \$10,000.00, payable to the Governor and his successors in office and conditioned upon the following:

(1) To account faithfully for all public and other funds or property coming into the principal’s custody, control, care, or possession; and

(2) To discharge truly and faithfully all the duties imposed upon him by law or by the rules and regulations of the board.

(b) The board may also require that any other officials, employees, or agents of the department or of the various penal institutions referred to in subsection (a) of this Code section shall give bond as referred to in subsection (a) of this Code section, in an amount to be determined by the board, but in no case to be less than \$5,000.00.

(c) All bonds given under this Code section shall be liable for any breach of the conditions specified in paragraphs (1) and (2) of subsection (a) of this Code section by a deputy, agent, or subordinate of the principal, whether expressed therein or not; and all such bonds shall be subject to and governed by all the provisions of Chapter 4 of Title 45 which are not in conflict with this Code section. The costs of bonds obtained for wardens and other officials or employees of the county correctional institutions shall be paid for by the county. The costs of bonds obtained for superintendents and other officials or employees of the state correctional institutions and of the department shall be paid for by the state. (Penal Code 1910, § 1197; Code 1933, § 77-311; Ga. L. 1956, p. 161, § 20; Ga. L. 1957, p. 477, § 5.)

Cross references. — Official bonds generally, T. 45, C. 4.

JUDICIAL DECISIONS

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Ga. App. 401, 163 S.E.2d 834 (1968); Price v. Arrendale*, 119 Ga. App. 589, 168 S.E.2d 193 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, § 487 et seq.

ALR. — Leave of court as prerequisite to action on statutory bond, 2 ALR 563.

Personal liability of policeman, sheriff,

or similar peace officer on his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 ALR3d 700.

42-5-33. Submission of monthly reports to commissioner by wardens and superintendents.

The wardens or superintendents of all state or county correctional institutions shall send monthly reports to the commissioner showing the names of all inmates held in custody. (Ga. L. 1956, p. 161, § 26.)

42-5-34. Powers of arrest of wardens, superintendents, and deputies.

Wardens and superintendents shall have authority to deputize any person in their employ. Wardens, superintendents, and their deputies are legally constituted arresting officers, with or without warrants, for the purpose of arresting persons violating Code Sections 42-5-14 through 42-5-18. Any person resisting arrest shall be dealt with as the law directs for resisting an officer. (Ga. L. 1961, p. 45, § 1; Ga. L. 1986, p. 1170, § 1.)

JUDICIAL DECISIONS

Cited in *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981).

42-5-35. Conferral of police powers; authorization to assist local law enforcement officers or correctional officers; retention of badge.

(a) The commissioner may confer all powers of a police officer of this state, including, but not limited to, the power to make summary arrests for violations of any of the criminal laws of this state and the power to carry weapons, upon wardens of county correctional institutions and upon persons in the commissioner's employment as the commissioner deems necessary, provided that individuals so designated meet the requirements specified in all applicable laws.

(b) The commissioner or his designee may authorize certain persons in his employment to assist law enforcement officers or correctional officers of local governments in preserving order and peace when so requested by such local authorities.

(c) Correctional employees leaving the service of the department under honorable conditions who have accumulated 25 or more years of service with the department as a certified peace officer or who are killed in the line of duty shall be entitled as part of such employee's compensation to retain his or her department issued badge or have such badge given to his or her surviving family member. If a correctional employee serving in a certified position leaves the service of the department due to a disability that arose in the line of duty and the disability prevents the employee from working as a law enforcement officer, then the employee shall be entitled as part of such employee's compensation to retain his or her department issued badge regardless of his or her number of years of service with the department. The board is authorized to promulgate rules and regulations for the implementation of this subsection. (Ga. L. 1956, p. 161, § 19; Ga. L. 1972, p. 599, § 1; Ga. L. 1975, p. 1246, § 1; Ga. L. 1983, p. 672, § 1; Ga. L. 1984, p.

22, § 42; Ga. L. 1986, p. 1170, § 2; Ga. L. 1987, p. 454, § 1; Ga. L. 1988, p. 464, § 1; Ga. L. 2007, p. 274, § 1/SB 235.)

JUDICIAL DECISIONS

Cited in *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981).

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Officer's actions in preventing escape must be with sole intent of discharging duty to prevent escape and arrest inmate. Any other intent on officer's part will eliminate the officer's defense of justification. 1981 Op. Att'y Gen. No. 81-82.

Extent of force permissible in preventing inmate escapes. — See 1981 Op. Att'y Gen. No. 81-82.

42-5-36. Confidentiality of information supplied by inmates; penalties for breach; classified nature of department investigation reports; confidentiality of certain identifying information; custodians of records.

(a) Officials and employees of the department shall respect the confidential nature of information supplied by inmates who cooperate in remedying abuses and wrongdoing in the penal system. Any official or employee who breaks such a confidence and thereby subjects a cooperating inmate to physical jeopardy or harassment shall be subject to suspension or discharge.

(b) Investigation reports and intelligence data prepared by the Internal Investigations Unit of the department shall be classified as confidential state secrets and privileged under law, unless declassified in writing by the commissioner.

(c) All institutional inmate files and central office inmate files of the department shall be classified as confidential state secrets and privileged under law, unless declassified in writing by the commissioner; provided, however, these records shall be subject to subpoena by a court of competent jurisdiction of this state.

(d)(1) As used in this subsection, the term "identifying information" means any records or information that reveals a name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications.

(2) The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall

be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.

(e) The commissioner shall designate members of the department to be the official custodians of the records of the department. The custodians may certify copies or compilations, including extracts thereof, of the records of the department. Subject to the provisions of this Code section, in response to a subpoena or upon the request of any appropriate government or judicial official, the department may provide a duly authenticated copy of any record or other document. This authenticated copy may consist of a photocopy or computer printout of the requested document certified by the commissioner or his or her duly authorized representative. (Ga. L. 1968, p. 1399, § 5; Ga. L. 1983, p. 680, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1984, p. 1361, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1997, p. 851, § 1; Ga. L. 2013, p. 1056, § 1A/HB 122.)

The 2013 amendment, effective July 1, 2013, added subsection (d); and redesignated former subsection (d) as present subsection (e).

Cross references. — Privileged communications generally, § 24-5-501 et seq.

Inspection of public records generally, § 50-18-70 et seq.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 230 (1997).

JUDICIAL DECISIONS

Cited in *Presnell v. State*, 274 Ga. 246, 551 S.E.2d 723 (2001).

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Declassification by commissioner. — Pursuant to O.C.G.A. § 42-5-36 investigation reports and intelligence data prepared by the Internal Investigations Unit of the Department of Offender Rehabilitation (Corrections) are classified as confi-

dential state secrets and privileged under law except as declassified in writing by the commissioner of offender rehabilitation (corrections). 1985 Op. Att’y Gen. No. 85-4.

42-5-37. Employees in control of inmates prohibited from receiving profit from inmate labor; penalties.

(a) No warden, superintendent, deputy, inspector, physician, or any officer or other employee who has charge, control, or direction of inmates shall be interested in any manner whatever in the work or profit of the labor of any inmate; nor shall any such personnel receive any pay, gift, gratuity, or favor of a valuable character from any person interested, either directly or indirectly, in such labor.

(b) Any person violating subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by

imprisonment for a term of not less than two years and not more than five years. The offense may be reduced to a misdemeanor by recommendation of the jury trying the case, if the court concurs in the jury's recommendation. In addition, a person who violates subsection (a) of this Code section shall be summarily discharged from the service of the state by the department.

(c) This Code section shall not prohibit a part-time professional employee from the regular practice of his profession. (Ga. L. 1908, p. 1119, § 11; Penal Code 1910, § 1196; Code 1933, § 77-9906; Ga. L. 1984, p. 639, § 3.)

JUDICIAL DECISIONS

Constitutionality of subsection (a). — While it is commonly understood that a warden will have a permissible interest in the performance of labor by inmates under the warden's control as that labor benefits the county or state, the clear meaning of O.C.G.A. § 42-5-37 is that a warden may not receive a personal interest or benefit from the labor of inmates under the warden's control. Therefore, subsection (a) is not void for vagueness. *Cleveland v. State*, 260 Ga. 770, 399 S.E.2d 472 (1991).

Warden's use of inmate labor for personal benefit. — Although, as warden, the defendant was permitted to live rent-free in a house located on county

property, the county did not benefit from routine use of inmates to perform personal housekeeping chores at the warden's home, as well as to walk the warden's dogs and clean the dog pens, baby-sit the warden's children, and wash the warden's personal vehicles. Inmates who refused to perform these chores were punished. The extensive evidence that the warden directed inmates to perform labor for the warden's personal benefit supports the warden's convictions for violating subsection (a) of O.C.G.A. § 42-5-37 beyond a reasonable doubt. *Cleveland v. State*, 260 Ga. 770, 399 S.E.2d 472 (1991).

Cited in *Smith v. Deering*, 880 F. Supp. 816 (S.D. Ga. 1994).

42-5-37.1. Compensation of employees of institutions operated by department for damages to wearing apparel caused by inmate action.

(a) As used in this Code section, the term "wearing apparel" means eyeglasses, hearing aids, clothing, and similar items worn on the person of the employee.

(b) When action by an inmate in one of the penal institutions operated by the department results in damage to an item of wearing apparel of an employee of the institution, the department shall compensate the employee for the loss in the amount of the repair cost, the replacement value, or the cost of the item of wearing apparel, whichever is less.

(c) Such losses shall be compensated only in accordance with procedures to be established by the department. (Ga. L. 1981, p. 1429, § 1.)

42-5-38. Making false statement as to age to procure employment.

Any person who makes a false statement as to his age in order to procure employment as a correctional officer, warden, superintendent, or other employee shall be guilty of a misdemeanor. (Ga. L. 1908, p. 1119, § 10; Penal Code 1910, § 1193; Code 1933, § 77-9905.)

42-5-39. Refusal by officer to receive inmates in correctional institution.

If the superintendent or warden of a state or county correctional institution or other officer or person employed therein whose duty it is to receive inmates fails or refuses to do so, he shall be punished by confinement not exceeding ten years and shall be dismissed from office. (Cobb's 1851 Digest, p. 807; Code 1863, § 4381; Code 1868, § 4419; Code 1873, § 4487; Code 1882, § 4487; Penal Code 1895, § 286; Penal Code 1910, § 290; Code 1933, § 77-9903.)

42-5-40. Requiring inmates to do unnecessary work on Sunday.

Any superintendent, warden, or other correctional official who causes any inmate to do any work on Sunday, except works of necessity, shall be guilty of a misdemeanor. (Ga. L. 1908, p. 1119, § 14; Penal Code 1910, § 420; Code 1933, § 26-6909; Code 1933, § 26-9909, enacted by Ga. L. 1968, p. 1249, § 1.)

Law reviews. — For comment criticizing judicial intervention in *Brown v. Teel*, 236 A.2d 699 (N.H. 1967), and advocating deference to legislative determination of Sunday business law, see 19 Mercer L. Rev. 445 (1968). For comment on *Hughes*

v. Reynolds, 223 Ga. 727, 157 S.E.2d 746 (1967), holding the Sunday Business Activities Act of 1967 (Code 1933, Ch. 96-8) unconstitutional, see 19 Mercer L. Rev. 479 (1968).

RESEARCH REFERENCES

ALR. — Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 ALR4th 246.

42-5-41. Compensation of department employee injured by inmate or probationer.

Repealed by Ga. L. 1986, p. 1491, § 2, effective July 1, 1986.

Editor's notes. — This Code section was based on Ga. L. 1985, p. 1113, § 1. For current provisions regarding compensa-

tion of department employees injured in the line of duty by an act of external violence, see Code Section 45-7-9.

ARTICLE 3

CONDITIONS OF DETENTION GENERALLY

RESEARCH REFERENCES

ALR. — Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219.

State regulation of conjugal or overnight familial visits in penal or correctional institutions, 29 ALR4th 1216.

42-5-50. Transmittal of information on convicted persons; place of detention; payment for inmates not transferred to the custody of the department; notice in the event of convicted person free on bond pending appeal.

(a) The clerk of the court shall notify the commissioner of a sentence within 30 working days following the receipt of the sentence and send other documents set forth in this Code section. Such notice shall be submitted electronically and shall contain the following documents:

- (1) A certified copy of the sentence;
- (2) A complete history of the convicted person, including a certified copy of the indictment, accusation, or both and such other information as the commissioner may require;
- (3) An affidavit of the custodian of such person indicating the total number of days the convicted person was incarcerated prior to the imposition of the sentence. It shall be the duty of the custodian of such person to transmit the affidavit provided for in this paragraph to the clerk of the superior court within ten days following the date on which the sentence is imposed;
- (4) Order of probation revocation or tolling of probation; and
- (5) A copy of the sentencing information report is required in all jurisdictions with an options system day reporting center certified by the department. The failure to provide the sentencing information report shall not cause an increase in the 15 day time period for the department to assign the inmate to a correctional institution as set forth in subsection (b) of this Code section.

All of the aforementioned documents shall be submitted on forms provided by the commissioner. The commissioner shall file one copy of each such document with the State Board of Pardons and Paroles within 30 working days of receipt of such documents from the clerk of the court. Except where the clerk is on a salary, the clerk shall receive from funds of the county the fee prescribed in Code Section 15-6-77 for such service.

(b) Within 15 days after the receipt of the information provided for in subsection (a) of this Code section, the commissioner shall assign the

convicted person to a correctional institution designated by the commissioner in accordance with subsection (b) of Code Section 42-5-51. It shall be the financial responsibility of the correctional institution to provide for the picking up and transportation, under guard, of the inmate to the inmate's assigned place of detention. If the inmate is assigned to a county correctional institution or other county facility, the county shall assume such duty and responsibility.

(c) The state shall pay for each such inmate not transferred to the custody of the department from a county facility the per diem rate specified by subsection (c) of Code Section 42-5-51 for each day the inmate remains in the custody of the county after the department receives the notice provided by subsection (a) of this Code section.

(d) In the event that the convicted person is free on bond pending the appeal of his or her conviction, the notice provided for in subsection (a) of this Code section shall not be transmitted to the commissioner until all appeals of such conviction have been disposed of or until the bond shall be revoked. (Ga. L. 1956, p. 161, § 13; Ga. L. 1968, p. 1399, § 1; Ga. L. 1977, p. 1098, § 9; Ga. L. 1982, p. 1364, § 1; Ga. L. 1983, p. 3, § 31; Ga. L. 1985, p. 149, § 42; Ga. L. 1990, p. 565, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1998, p. 194, § 1; Ga. L. 2004, p. 775, § 2; Ga. L. 2010, p. 214, § 17/HB 567; Ga. L. 2012, p. 899, § 7-5/HB 1176; Ga. L. 2013, p. 141, § 42/HB 79.)

The 2012 amendment, effective July 1, 2012, substituted "submitted electronically and shall contain" for "mailed within such time period by first-class mail and shall be accompanied by two complete and certified sentence packages containing" in the second sentence of the introductory paragraph of subsection (a); substituted "department" for "Department of Corrections" at the end of the first sentence in paragraph (a)(5); and substituted "documents shall" for "documents will" in the first sentence of the ending undesignated paragraph following paragraph (a)(5). See editor's note for applicability.

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised language at the end of the last sentence of paragraph (a)(5).

Cross references. — Imposition of sentence generally, § 17-10-1.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under Ga. L. 1937, p. 758 are

included in the annotations for this Code section.

Section is mandatory. — O.C.G.A.

§ 42-5-50 is mandatory in the statute's application; moreover, even if *Whidden v. State*, 160 Ga. App. 177, 287 S.E.2d 114 (1982), was applicable, the state failed to show that the defendant's removal to the state penitentiary while the defendant's appeal was pending was for the defendant's own safety, since the number of prisoners in the county jail was less than the jail's capacity. *Helmeci v. State*, 230 Ga. App. 866, 498 S.E.2d 326 (1998).

Trial court erred in granting summary judgment in favor of a former clerk and a deputy clerk in an inmate's action alleging that they breached their duty to notify the department of corrections of the inmate's amended sentence as required by O.C.G.A. § 42-5-50(a), because the court of appeals previously ruled in the case that the clerks were not entitled to official immunity in their individual capacities for failing to perform the ministerial act of communicating the inmate's sentence to the DOC, and nothing in the record following remand changed that ruling; Code Section 42-5-50(a) is imperative, and its performance is neither discretionary nor dependent upon a direction from the parties at interest. *McGee v. Hicks*, 303 Ga. App. 130, 693 S.E.2d 130 (2010), *aff'd*, 289 Ga. 573, 713 S.E.2d 841 (2011).

Ministerial duties of clerk. — Because the duties of a clerk of court to forward sentencing orders to the DOC as mandated by O.C.G.A. § 42-5-50 were ministerial rather than discretionary, and were unambiguously triggered by the filing of a sentencing order which the clerk neglected to send, the clerk was not entitled to official immunity in a prisoner's case seeking damages for remaining incarcerated 22 months longer than necessary. *Hicks v. McGee*, 289 Ga. 573, 713 S.E.2d 841 (2011).

Language in sentence designating place of incarceration surplusage but not void. — When one guilty of a misdemeanor is sentenced to be "confined at labor at the State Penitentiary at Reidsville, Georgia (Georgia State Prison), or such other place as the proper authority may direct," such portion of the sentence as seeks to designate the place of confinement, when no effort so to confine the prisoner is shown and since the direc-

tor of the department of corrections (now commissioner of corrections) designates where most sentences are served, is mere surplusage, and, though technically not in the right form, is not such an irregularity as is hurtful to any right of liberty, or such a defect as makes the sentence void. *Mathis v. Scott*, 199 Ga. 743, 35 S.E.2d 285 (1945) (decided under Ga. L. 1937, p. 758).

Application of continuous tort doctrine to alleged violation. — O.C.G.A. § 9-3-33, under the continuous tort doctrine, did not bar a former inmate's negligence claim against two court clerks, based on their alleged failure to communicate the inmate's sentence to the Department of Corrections as the clerks' violation of their continuing duty to communicate the inmate's sentence to the Department resulted in continuous injury in the form of an ever-increasing illegal confinement that was not eliminated until the inmate was released from prison; hence, the trial court erred in finding that the claim was time-barred. *Hicks v. McGee*, 283 Ga. App. 678, 642 S.E.2d 379 (2007), cert. denied, 2007 Ga. LEXIS 512 (Ga. 2007).

Reversal of conviction not remedy. — Defendant could not obtain a reversal of defendant's conviction due to an alleged violation of O.C.G.A. § 42-5-50(c) by defendant's transfer to the state penitentiary after the defendant's conviction as: (1) defendant never obtained a ruling on the defendant's O.C.G.A. § 42-5-50(c) motion, which waived the defendant's allegation of error for appeal purposes; (2) O.C.G.A. § 42-5-50(c) did not provide for reversal of a conviction if a trial court refused to keep a convicted defendant in the county jail; and (3) the defendant failed to show that the results of the defendant's appeal would have been different had the defendant been held in the county jail. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Effect of failing to keep defendant in jail. — O.C.G.A. § 42-5-50(c) does not provide for reversal of a conviction if a trial court refuses to keep a convicted defendant in the county jail. *Wilbanks v. State*, 251 Ga. App. 248, 554 S.E.2d 248 (2001).

Section did not provide sufficient grounds to prevent extradition. —

Trial court properly denied a prisoner's petition for a writ of habeas corpus pursuant to O.C.G.A. § 17-13-30 seeking to block extradition; O.C.G.A. § 42-5-50 did not prevent the defendant from being extradited while defendant's motion for a new trial was pending. Instead O.C.G.A. § 42-5-50 addresses the situation in which defense counsel certifies to the court that it is required that the convicted person remain in the local jail or lockup rather than being transferred to the assigned correctional institution in order to properly prosecute an appeal of the conviction. *Bradford v. Brown*, 277 Ga. 92, 586 S.E.2d 631 (2003).

Custody of defendant pending appeal in extraordinary circumstances. —

Following the conviction of the defendant, a former sheriff, for murdering a successful electoral opponent, the trial court did not violate O.C.G.A. § 42-5-50(c) by denying the defense counsel's requests that the defendant remain housed in a county facility so as to give counsel access to the defendant for purposes of prosecuting an appeal because the defendant was a high security risk, and the defendant's status as a former law enforcement officer required rotating the defendant's placement in metropolitan jails. *Dorsey v. State*, 279 Ga. 534, 615 S.E.2d 512 (2005).

Absent evidence of defendant's inducement guilty plea not void. — Defendant's dissatisfaction as to the defendant's incarceration in an institution other than one recommended by the court does not render the defendant's guilty plea void when there is no evidence that it constituted a part of the inducement to enter the plea. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

Finality of board's decisions. — Board controls prison system and the board's administrative decisions are final absent violation of rights enforceable in the courts; thus, enumeration of error is waived when the defendant admits that the trial court and the district attorney kept their part of the agreement. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

Cited in *Ricketts v. Brantley*, 239 Ga. 151, 236 S.E.2d 51 (1977); *Wise v. Balkcom*, 245 Ga. 126, 263 S.E.2d 158 (1980); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982); *Welch v. State*, 172 Ga. App. 654, 324 S.E.2d 488 (1984); *Eubanks v. State*, 229 Ga. App. 667, 494 S.E.2d 564 (1998); *Giles v. State*, 257 Ga. App. 65, 570 S.E.2d 375 (2002); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Felons must serve sentence under department's custody. —

Since all convicted felons sentenced to a term of incarceration now serve their sentences under the jurisdiction of the department, judges of the superior courts lack the authority to sentence an inmate to the custody of any other person or entity. 1993 Op. Att'y Gen. No. 93-17.

Pending appeal, department cannot take custody of prisoner. —

Department cannot, without a valid request from the prisoner or the prisoner's attorney, take custody of a prisoner whose motion for new trial has been denied and whose attorney has stated that the attor-

ney will file an appeal within the required 30 days, so long as this time has not expired. 1973 Op. Att'y Gen. No. 73-153.

Finality of convictions. — During the 30-day period in which an appeal may be filed, a conviction is not final within the meaning of subsection (a) of this section; accordingly, unless there has been a valid request for transfer, the department cannot assume lawful custody of the prisoner. 1973 Op. Att'y Gen. No. 73-153.

Restrictions as to incarceration in board-operated institution. — Individual awaiting disposition of a pending criminal charge and who is not serving a sentence in the state correctional system

may not be incarcerated in an institution operated by the Board of Corrections. 1970 Op. Att'y Gen. No. 70-111.

Summons in lieu of indictment or accusation. — When an inmate has been brought to trial and convicted upon a summons, rather than an indictment or an accusation, the clerk of the court in which the conviction was returned must furnish to the Department of Offender Rehabilitation (Corrections) a certified copy of that summons; in such cases, the certified copy of the summons stands in lieu of an indictment or accusation. 1969 Op. Att'y Gen. No. 69-517.

Lost indictment. — Clerk's certification that indictment is lost is not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61.

Because the General Assembly contemplated receipt of the document specifying the charge of which the inmate had been found guilty, a clerk's certification that the indictment is lost is not sufficient replacement for a certified copy of the actual indictment. 1969 Op. Att'y Gen. No. 69-517.

Whether punishment computed on basis of felony or misdemeanor. — Whether punishment is computed on the basis of a felony or a misdemeanor sentence is controlled by the conviction; a prisoner is either a misdemeanant or a felon, dependent on the crime for which the prisoner was convicted. 1970 Op. Att'y Gen. No. 70-49.

When sentence contains reduction of an offense from felony to misdemeanor, sentence should be computed as a misdemeanor because those authorized to fix the sentence have elected to so treat it. 1970 Op. Att'y Gen. No. 70-49.

Sentence does not have a shifting quality, allowing the sentence to vacillate between misdemeanor and felony status at different times or for different purposes. 1970 Op. Att'y Gen. No. 70-49.

Presumption of validity of sentence. — When the director of corrections

(now commissioner of corrections) receives the certificate of the clerk of the sentencing court, the presumption is that the sentence imposed is a valid sentence. 1977 Op. Att'y Gen. No. 77-71.

Board prescribes conditions of work required of prisoners. — In view of the broad language found in subsection (e) of Ga. L. 1957, p. 477, § 4 (see now O.C.G.A. § 42-5-60) that prison labor could be required in public buildings in any such manner as deemed advisable by the Board of Offender Rehabilitation (Corrections), it is obvious that the legislature intended the board to prescribe the conditions of work required of the prisoners; and even though some of the prisoners are physically restrained for overnight periods in county jails, their primary assignment is nonetheless to the prison or public work camp (now county correctional institution) as determined by the commissioner; in turn the prison or camp has sole administrative responsibility and control of the prisoner even though the prisoner may be temporarily attached to the county jail to perform the required repair or maintenance services; such a temporary attachment is not an assignment which contravenes the language of Ga. L. 1956, p. 161, § 13 (see now O.C.G.A. § 42-5-50). 1963-65 Op. Att'y Gen. p. 72.

Data on inmates' jail time prior to trial. — Director of corrections (now commissioner of corrections) is authorized to devise and distribute such forms as may be necessary to implement Ga. L. 1970, p. 692, §§ 1-4 (see now O.C.G.A. §§ 17-10-11 and 17-10-12) (relating to time spent in confinement awaiting trial); the director may require that data concerning the number of days an inmate spent in jail prior to trial be transmitted to the Board of Corrections upon forms approved and distributed by the board. 1970 Op. Att'y Gen. No. 70-127.

Vehicles to transport prisoners. — There are no specific requirements as to types of vehicles which may be used to transport prisoners. 1962 Op. Att'y Gen. p. 382.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 134.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 17-25, 128, 129.

ALR. — Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory, 95 ALR 1455.

42-5-51. Jurisdiction over certain misdemeanor offenders; designation of place of confinement of inmates; reimbursement of county; transfer of inmates to federal authority.

(a) The department shall have no authority, jurisdiction, or responsibility with respect to misdemeanor offenders sentenced under paragraph (1) of subsection (a) of Code Section 17-10-3 to confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates. The county wherein the sentence is imposed shall have the sole responsibility of executing the sentence and of providing for the care, maintenance, and upkeep of the inmate while serving such sentence; provided, however, that, where the sentencing judge certifies to the department that the county facilities of that county are inadequate for maintaining female inmates, any female inmate may be committed to the department to serve her sentence in a state correctional institution, as may be directed by the department; provided, further, that the delivery of the female inmates to the proper place of incarceration shall be at the expense of the county of conviction.

(b) Where any person is convicted of any offense, misdemeanor, or felony and sentenced to serve time in any penal institution in this state other than as provided in subsection (a) of this Code section, he shall be committed to the custody of the commissioner who, with the approval of the board, shall designate the place of confinement where the sentence shall be served.

(c) After proper documentation is received from the clerk of the court, the department shall have 15 days to transfer an inmate under sentence to the place of confinement. If the inmate is not transferred within the 15 days, the department shall reimburse the county, in a sum not less than \$7.50 per day per inmate and in such an amount as may be appropriated for this purpose by the General Assembly, for the cost of the incarceration, commencing 15 days after proper documentation is received by the department from the clerk of the court; provided, however, that, subject to an appropriation of funds, local governing authorities that have entered into memorandums of understanding or agreement or that demonstrate continuous attempts to enter into memorandums of understanding or agreement with the federal government under Section 287(g) of the federal Immigration and Nationality

Act shall receive an additional payment in the amount of 10 percent of the established rate paid for reimbursement for the confinement of state inmates in local confinement facilities. The reimbursement provisions of this Code section shall only apply to payment for the incarceration of felony inmates available for transfer to the department, except inmates under death sentence awaiting transfer after their initial trial, and shall not apply to inmates who were incarcerated under the custody of the commissioner at the time they were returned to the county jail for trial on additional charges or returned to the county jail for any other purposes, including for the purpose of a new trial.

(d) Notwithstanding any language in the sentence as passed by the court, the commissioner may designate as a place of confinement any available, suitable, and appropriate state or county correctional institution in this state operated under the jurisdiction or supervision of the department. The commissioner shall also have sole authority to transfer inmates from one state or county correctional institution in this state to any other such institution operated by or under the jurisdiction or supervision of or approved by the board. Neither male nor female state inmates shall be assigned to serve in any manner in a county jail unless they are participating in a state sponsored project and have the approval of the commissioner and the sheriff or the jail administrator of the county. Furthermore, the commissioner may transfer to the Attorney General of the United States for confinement any inmate if it is determined that the custody, care, treatment, training, or rehabilitation of the inmate has not been adequate or in the best interest of the inmate or his fellow inmates. The commissioner is authorized to contract with the Attorney General of the United States for the custody, care, subsistence, housing, treatment, training, and rehabilitation of such inmates. (Ga. L. 1956, p. 161, § 13; Ga. L. 1964, p. 489, § 2; Ga. L. 1968, p. 1399, § 1; Ga. L. 1972, p. 582, § 1; Ga. L. 1973, p. 1297, § 1; Ga. L. 1979, p. 376, § 1; Ga. L. 1981, p. 1434, § 1; Ga. L. 1982, p. 1364, § 2; Ga. L. 1984, p. 604, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 2011, p. 794, § 14/HB 87.)

Editor's notes. — Ga. L. 2011, p. 794, § 1/HB 87, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Illegal Immigration Reform and Enforcement Act of 2011.'"

Ga. L. 2011, p. 794, § 21/HB 87, not codified by the General Assembly, provides that: "(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act

or any other part of this Act than can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

"(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

"(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights."

Ga. L. 2011, p. 794, § 22/HB 87, not

codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

Law reviews. — For article surveying

legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, § 77-313 and Ga. L. 1937, p. 758 are included in the annotations for this Code section.

Function of the prison commission (now Board of Corrections) is to enforce sentences that are lawfully imposed, and the question as to whether a court is acting within the court's jurisdiction in modifying a sentence is in nowise affected by this section. *Gobles v. Hayes*, 194 Ga. 297, 21 S.E.2d 624 (1942) (decided under former Code 1933, § 77-313).

Board of Corrections controls prison system and the Board's administrative decisions are final absent violation of rights enforceable in the courts; this enumeration of error is waived if the defendant admits that the trial court and the district attorney have kept their part of the agreement. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

Standing. — Because a county could sue the state agencies by challenging the constitutionality of O.C.G.A. §§ 42-9-49 and 42-5-51(c) (regarding reimbursement of the detention costs of certain state inmates), and because the county did not dispute that the agencies complied with the sections, the trial court should have granted the agencies' motion for summary judgment. *Ga. Dep't of Corr. v. Chatham County*, 274 Ga. App. 865, 619 S.E.2d 373 (2005).

County was without authority. — Since the defendant was sentenced as a felon upon the defendant's plea of guilty to the felony of making terroristic threats and misdemeanor battery, the court did not have authority to sentence the defendant to a county jail and the county had no authority to calculate the defendant's jail time. *Eubanks v. State*, 229 Ga. App. 667, 494 S.E.2d 564 (1998).

Absent evidence of defendant's inducement guilty plea not void. — Defendant's dissatisfaction as to the defendant's incarceration in an institution other than the one recommended by the court does not render the defendant's guilty plea void, when there is no evidence that it constituted a part of the inducement to enter the plea. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

Language in sentence designating place of incarceration surplusage. — When one guilty of a misdemeanor is sentenced to be "confined at labor at the State Penitentiary (Georgia State Prison) at Reidsville, Georgia, or such other place as the proper authority may direct," such portion of the sentence as seeks to designate the place of confinement, when no effort so to confine the prisoner is shown and since the director of the department of corrections (now commissioner of corrections) designates where most sentences are served, is mere surplusage, and, though technically not in the right form, is not such an irregularity as is hurtful to any right of liberty, or such a defect as makes the sentence void. *Mathis v. Scott*, 199 Ga. 743, 35 S.E.2d 285 (1945) (decided under Ga. L. 1937, p. 758).

Trial court cannot require the Department of Corrections to place a convicted felon in a particular facility; however, language in a sentence purporting to designate a place of confinement is mere surplusage and is not a defect that will render the sentence void. *Stewart v. State*, 285 Ga. App. 760, 647 S.E.2d 411 (2007).

Superior court empowered to transfer habeas corpus petitioner. — Superior court in this state has the power to order a habeas corpus petitioner under sentence of state court transferred from one penal institution to another, when this is necessary to grant the petitioner's constitutional right to meaningful access

to the courts. To the extent that there exists a conflict between the statutory authority vested in the department to transfer prisoners from one correctional institute to another, and the authority vested in the superior court to enforce the Constitution, the former must yield to the latter. *James v. Hight*, 251 Ga. 563, 307 S.E.2d 660 (1983).

Trial court lacked jurisdiction over defendant once imprisonment imposed. — Once a felony conviction was entered, and a defendant was sentenced to incarceration, the trial court lacked the authority to designate where that defendant must serve the incarceration, since

this decision lies solely with the Department of Corrections under O.C.G.A. § 42-5-51(b). *Florescu v. State*, 276 Ga. App. 264, 623 S.E.2d 147 (2005).

Cited in *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *In re Prisoners Awaiting Transf.*, 236 Ga. 516, 224 S.E.2d 905 (1976); *McKenze v. State*, 140 Ga. App. 402, 231 S.E.2d 149 (1976); *Wise v. Balkcom*, 245 Ga. 126, 263 S.E.2d 158 (1980); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982); *Hawk v. Georgia Dep't of Cors.*, 44 F.3d 965 (11th Cir. 1995); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

CUSTODY OF PRISONERS

YOUTHFUL OFFENDERS

MISDEMEANANTS OR FELONS

General Consideration

Assignments to county correctional institutions. — Only the director of corrections (now commissioner of corrections), with the approval of the Board of Corrections, may make assignments of state prisoners to county correctional institutions. 1975 Op. Att'y Gen. No. U75-93.

Board prescribes conditions of work required of prisoners. — In view of the broad language found in subsection (e) of Ga. L. 1957, p. 477, § 4 (see now O.C.G.A. § 42-5-60) that prison labor could be required in public buildings in any such manner as deemed advisable by the Board of Corrections, it is obvious that the legislature intended the board to prescribe the conditions of work required of the prisoners; and even though some of the prisoners are physically restrained for overnight periods in county jails, their primary assignment is nonetheless to the prison or public work camp (now county correctional institution) as determined by the commissioner; in turn the prison or camp has sole administrative responsibility and control of the prisoner even though the prisoner may be temporarily attached to the county jail to perform the required

repair or maintenance services; such a temporary attachment is not an assignment which contravenes the language of Ga. L. 1956, p. 161, § 13 (see now O.C.G.A. § 42-5-51). 1963-65 Op. Att'y Gen. p. 72.

Employment of inmates not prohibited. — There is no provision in the law to prohibit employment for most inmates as long as the requirements of this section are met. 1980 Op. Att'y Gen. No. 80-44.

Part-time employment of "maintenance" inmates. — If a program is implemented allowing "maintenance" inmates to have part-time jobs, it must fit all of the requirements of this section. 1980 Op. Att'y Gen. No. 80-44.

Though a program for part-time employment by "maintenance" inmates by center personnel could be developed under this section for "maintenance" inmates, such a program would be unwise. 1980 Op. Att'y Gen. No. 80-44.

Presumption of validity of sentence. — When the director of corrections (now commissioner of corrections) receives the certificate of the clerk of the sentencing court, the presumption is that the sentence imposed is a valid sentence. 1977 Op. Att'y Gen. No. 77-71.

Incarceration of federal prisoners in penal system. — Board of Corrections may not enter into a contract with the bureau of prisons for the incarceration of a federal prisoner in the penal system of this state. 1968 Op. Att’y Gen. No. 68-86.

Contracting with private consulting firm for operation of prerelease center. — Board cannot contract with a private consulting firm for operation of a prerelease center; even if such power existed, the director of corrections (now commissioner of corrections) does not have the authority to assign inmates committed to the custody of the board to such a private institution. 1973 Op. Att’y Gen. No. 73-72.

Requests from county probation department for retention of custody of inmate pending arrival of deputy sheriff or probation officer must be disregarded by the wardens. 1969 Op. Att’y Gen. No. 69-151.

Commitment of prisoners to county correctional institution by recorder’s court. — Recorder’s court would have the authority to commit an individual to a county public works camp (now county correctional institution) which operates under the jurisdiction of the Board of Corrections, provided that the city prisoners committed are not required to work on the county public works camp (now county correctional institution); that they are otherwise separated from county prisoners convicted of state felonies and misdemeanors; and that the receiving county is compensated for the board and upkeep of such city prisoners. 1968 Op. Att’y Gen. No. 68-175.

Vehicles to transport prisoners. — There are no specific requirements as to types of vehicles which may be used to transport prisoners. 1962 Op. Att’y Gen. p. 382.

Reimbursement provisions of O.C.G.A. § 42-5-51(c) do not apply to probationers awaiting transfer to probation detention centers or probation diversion centers. 2002 Op. Att’y Gen. No. 2002-1.

Custody of Prisoners

Felons must serve sentence under department’s custody. — Since all convicted felons sentenced to a term of incar-

ceration now serve their sentences under the jurisdiction of the department, judges of the superior courts lack the authority to sentence an inmate to the custody of any other person or entity. 1993 Op. Att’y Gen. No. 93-17.

Obligation of department to accept prisoner into state penal system arises only upon: (1) “sentencing” of prisoner to actually serve time in state institution; and (2) receipt by department of proper documentation of sentence by clerk of court. 1982 Op. Att’y Gen. No. 82-33.

Upon revocation of parole and the sentencing to serve time in a penal institution, the state has an obligation to accept such persons into the state penal system. 1982 Op. Att’y Gen. No. 82-33.

Pending appeal department cannot take custody of prisoner. — Department of Corrections cannot, without a valid request from the prisoner or the prisoner’s attorney, take custody of a prisoner whose motion for new trial has been denied and whose attorney has stated that the attorney will file an appeal within the required 30 days, so long as this time has not expired. 1973 Op. Att’y Gen. No. 73-153 (rendered prior to 1982 amendment).

Finality of conviction. — During the 30-day period in which an appeal may be filed, a conviction is not final within the meaning of subsection (a) of Ga. L. 1968, p. 1399, § 1 (see now O.C.G.A. § 42-5-50); accordingly, unless there has been a valid request for transfer, the Department of Corrections cannot assume lawful custody of the prisoner. 1973 Op. Att’y Gen. No. 73-153 (rendered prior to 1982 amendment).

Restrictions as to incarceration in board-operated institution. — Individual awaiting disposition of a pending criminal charge and who is not serving a sentence in the state correctional system may not be incarcerated in an institution operated by the Board of Corrections. 1970 Op. Att’y Gen. No. 70-111.

Custody of prisoners sentenced to death. — Supervening events described by former Code 1933, § 27-2514 (see now O.C.G.A. § 17-10-33) did not include filing motion for new trial so that such nonfinality of conviction which, by the

Custody of Prisoners (Cont'd)

terms of subsection (a) of Ga. L. 1968, p. 1399, § 1 (see now O.C.G.A. § 42-5-50), precluded acceptance of custody of prisoners "sentenced to serve time" (subsection (b) of this section), did not in the case of prisoners sentenced to be executed, preclude acceptance of custody; the procedure of retention of convicted prisoners in the county jails until the prisoners' convictions have become final, as provided in subsection (a) of Ga. L. 1968, p. 1399, § 1, did not apply to persons sentenced to death because (1) the individuals not "sentenced to serve time" (subsection (b) of this section) and therefore did not have "such a sentence," in the words of subsection (a) of Ga. L. 1968, p. 1399, § 1, and, (2) former Code 1933, § 27-2514 specifically required the sheriff to convey the individuals to the penitentiary unless (a) the Governor directed otherwise, or (b) a stay had been caused by appeal, or (c) a new trial had been granted, or (d) a court ordered otherwise. 1971 Op. Att'y Gen. No. 71-188.

Youthful Offenders

Board designated sole agency for reception and assignment. — As a general rule, the legislature has designated the Board of Offender Rehabilitation (Corrections) sole agency for reception and assignment of convicted misdemeanants and felons. Notable exceptions to this general provision concern individuals convicted of misdemeanors who, under certain conditions, must be placed in a county institution and, under other conditions, may be placed in such facilities in the discretion of the trial court; and one notable exception provides that the Division for Children and Youth is designated the exclusive state agency for the acceptance and incarceration of all misdemeanants and felons under the age of 17 years; provided, however, that those felons convicted of a capital felony shall only be sentenced into the custody of the Department of Offender Rehabilitation (Corrections). 1972 Op. Att'y Gen. No. 72-3.

Restriction and discretion on releasing and assigning youthful offenders. — When a combination of youth-

ful offender and standard sentences occur, the Youthful Offender Division may not approve a conditional or unconditional release for the described youthful offender until the youth's concurrent standard sentence has expired; nevertheless, the youth could be assigned to an institution maintained primarily for youthful offenders during the entire period for which the board is charged with custody over the youth, since Ga. L. 1956, p. 161 (see now O.C.G.A. § 42-5-50(b) and subsections (b) and (d) of O.C.G.A. § 42-5-51) empowers the board to assign inmates to any institution within its system, and the statutory law authorizes the director of corrections (now commissioner of corrections) to segregate youthful offenders from other prisoners. 1973 Op. Att'y Gen. No. 73-82.

Defined class of offenders set out. — Ga. L. 1970, p. 451, § 3 (see now O.C.G.A. § 49-5-7) set apart a defined class of offenders and directed how those offenders were to be punished for the offense; in doing this, the power of any superior court to try an individual under the age of 17 for any given crime was in no way affected; in this respect, Ga. L. 1970, p. 451, § 3 was like Ga. L. 1968, p. 1399, § 1 (see now O.C.G.A. § 42-5-51) which provides that the commissioner of corrections and not the sentencing court designates the place of confinement of any individual within the court's jurisdiction. 1972 Op. Att'y Gen. No. 72-3.

Misdemeanants or Felons

Whether punishment computed on basis of felony or misdemeanor. — Whether punishment is computed on the basis of a felony or a misdemeanor sentence is controlled by the conviction; a prisoner is either a misdemeanant or a felon, dependent on the crime for which the prisoner was convicted. 1970 Op. Att'y Gen. No. 70-49.

When sentence contains reduction of an offense from felony to misdemeanor, sentence should be computed as a misdemeanor because those authorized to fix the sentence have elected to so treat it. 1970 Op. Att'y Gen. No. 70-49.

Language in sentence designating place of incarceration. — All felons and misdemeanants, other than those

misemeanants committed directly to a county public works camp (now county correctional institution), must be committed directly and exclusively to the Board of Corrections; only the director of corrections (now commissioner of corrections) is authorized to prescribe the place of confinement; so much of the language of a sentence committing an inmate to a term of penal servitude in the state prison system as purports to commit the inmate to Central State Hospital is surplusage

and should not be relied upon by the officials of the hospital or the Board of Corrections as authority for the retention of custody of the inmate at the hospital. 1970 Op. Att'y Gen. No. 70-133.

Receipt of prisoners from mayor's court. — Board has authority to receive misdemeanor prisoners from a mayor's court of a municipality when there is no city or county court in that county. 1954-56 Op. Att'y Gen. p. 529.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 7, 10, 12, 130, 134.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 17-25, 128, 129, 134.

ALR. — Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory, 95 ALR 1455.

Validity, construction, and application of statutory provision for reimbursement of state (or subdivision thereof) for expense of keeping prisoner, 139 ALR 1028.

What felonies are inherently or

foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 ALR3d 397.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

Validity, construction, and application of state statute requiring inmate to reimburse government for expense of incarceration, 13 ALR5th 872.

42-5-52. Classification and separation of inmates generally; placement of juvenile offenders and of females; transfer of mentally diseased, alcoholic, drug addicted, or tubercular inmates.

(a) The department shall provide for the classification and separation of inmates with respect to age, first offenders, habitual criminals and incorrigibles, diseased inmates, mentally diseased inmates, and those having contagious, infectious, and incurable diseases. Incorrigible inmates in county correctional institutions shall be returned to the department at the request of the proper county authority.

(b) The department may establish separate correctional or similar institutions for the separation and care of juvenile offenders. The commissioner may transfer any juvenile under 17 years of age from the penal institution in which he or she is serving to the Department of Juvenile Justice, provided that the transfer is approved thereby. The juvenile may be returned to the custody of the commissioner when the commissioner of juvenile justice determines that the juvenile is unsuited to be dealt with therein. The commissioner may accept a juvenile for transfer into a penal institution upon the request of the commissioner of juvenile justice if such juvenile is 16 years of age or older and

has been committed to the Department of Juvenile Justice for a class A designated felony act or class B designated felony act, as defined by Code Section 15-11-2, and such juvenile's behavior presents a substantial danger to any person at or within a Department of Juvenile Justice facility. In the event of such transfer, the department shall have the same authority over and responsibility for such juvenile as the Department of Juvenile Justice has for such juvenile and shall maintain sight and sound separation as set forth in paragraph (5) of subsection (c) of Code Section 15-11-504.

(c) Female inmates shall be removed from proximity to the place of detention for males and shall not be confined in a county correctional institution or other county facility except with the express written approval of the department.

(d) The department is authorized to transfer a mentally diseased inmate from a state or county correctional institution or other facility operating under its authority to a criminal ward or facility of the Department of Behavioral Health and Developmental Disabilities. The inmate shall remain in the custody of the Department of Behavioral Health and Developmental Disabilities until proper officials of the facility at which the inmate is detained declare that his or her sanity has been restored, at which time the inmate shall be returned to the custody of the department. At any time after completion of his or her sentence, an inmate detained by the Department of Behavioral Health and Developmental Disabilities on the grounds that he or she is mentally diseased may petition for release in accordance with the procedure provided in Chapter 3 of Title 37. Prior to completion of his or her sentence, this procedure shall not be available to the inmate.

(e) Upon being presented with a proper certification from the county physician of a county where a person has been sentenced to confinement that the person sentenced is addicted to drugs or alcohol to the extent that the person's health will be impaired or life endangered if immediate treatment is not rendered, the department shall transfer the inmate to the custody of the Department of Behavioral Health and Developmental Disabilities. The inmate shall remain in such custody until officials of the Department of Behavioral Health and Developmental Disabilities determine the inmate is able to serve his or her sentence elsewhere.

(f) The department may transfer any inmate afflicted with active tuberculosis from any state or county correctional institution, or any other facility operating under the authority of the department, to a tubercular ward or facility specially provided and maintained for criminals by the department at a tuberculosis facility or facilities operating under the Department of Public Health. (Ga. L. 1897, p. 71, § 8; Penal Code 1910, § 1203; Ga. L. 1931, Ex. Sess., p. 118, §§ 8, 9;

Code 1933, §§ 77-317, 77-318, 77-319; Ga. L. 1956, p. 161, § 14; Ga. L. 1957, p. 477, § 2; Ga. L. 1960, p. 234, § 1; Ga. L. 1962, p. 699, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 1983, § 21; Ga. L. 1997, p. 1453, §§ 1, 2; Ga. L. 2009, p. 453, § 3-23/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214; Ga. L. 2013, p. 294, § 2-1/HB 242.)

The 2013 amendment, effective January 1, 2014, in subsection (b), inserted “or she” in the second sentence, and added the fourth and fifth sentences. See editor’s note for applicability.

Cross references. — Commitment of juvenile to adult correctional facility prohibited, § 15-11-34.

Editor’s notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: “This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such

offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

For note, “Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia,” see 8 Ga. L. Rev. 919 (1974).

JUDICIAL DECISIONS

Confinement of drug addict not cruel and unusual punishment. — Although the defendant’s physician certified that the defendant was a drug addict and withdrawal from drugs was inadvisable, a sentence of 12 months and a fine of \$500.00 was not cruel and unusual punishment in light of subsection (e) of this section. *Trammell v. State*, 125 Ga. App. 39, 186 S.E.2d 438 (1971).

Cited in *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968); *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *Southerland v. Ga. Dep’t of Corr.*, 293 Ga. App. 56, 666 S.E.2d 383 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Editor’s notes. — In light of the similarity of the statutory provisions, opinions rendered under former Code 1933, § 77-401 are included in the annotations for this Code section.

Transfer of inmate to mental hospital. — Board of Corrections can transfer an inmate to Central State Hospital for treatment as a mentally diseased inmate; if an inmate is declared sane prior to completion of the inmate’s existing sentence, the inmate can be returned to stand trial for outstanding charges. 1970 Op. Att’y Gen. No. 70-72.

Subsections (a) and (c) of former Code

1933, §§ 77-317, 77-318, and 77-319 (see now O.C.G.A. §§ 42-2-8, 42-2-9, and 42-5-52), indicate that the director of the Board of Corrections (now commissioner of corrections) is authorized to determine whether or not an inmate is mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att’y Gen. No. 68-136.

Retention of administrative control over transferred prisoners. — By implication from the language of this section, the Board of Corrections retains a certain amount of administrative control over a prisoner transferred to the criminal facil-

ities at Central State Hospital. 1975 Op. Att'y Gen. No. 75-146.

Transfer to state hospital of alcoholic or drug addict prisoners. — In order that an alcoholic or drug addict who is a prisoner be transferred to a state hospital, the county physician must certify that the health of the prisoner will be impaired or the prisoner's life endangered unless treatment is received. 1962 Op. Att'y Gen. p. 381.

Removal of alcoholic prisoner to other institution. — When a prisoner certified to be an alcoholic is sent to a state hospital, that prisoner may be removed to another prison when hospital authorities determine the prisoner is able to serve the sentence elsewhere. 1962 Op. Att'y Gen. p. 378.

Good time allowances for mentally

ill prisoners. — Board of Corrections has the power to promulgate rules and regulations as to good time allowances which are applicable to prisoners transferred to Central State Hospital due to mental illness. 1975 Op. Att'y Gen. No. 75-146.

Administration of shock treatment to prisoners. — Convicted felons should and will only be given shock treatment at the Milledgeville State Hospital (now Central State Hospital) and then only when prescribed by a staff physician of that hospital. 1965-66 Op. Att'y Gen. No. 66-214.

Responsibility for returning an insane fugitive convict to the state is on the Department of Corrections. 1945-47 Op. Att'y Gen. p. 427 (decided under former Code 1933, § 77-401).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 83, 84, 133.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 23-25, 85, 86, 128, 129, 136, 140.

ALR. — Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 ALR3d 568.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

42-5-52.1. Submission to HIV test; separate housing for HIV infected persons.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for that term in Code Section 31-22-9.1.

(b) Where any person is committed to the custody of the commissioner to serve time in any penal institution of this state on and after July 1, 1988, the department shall require that person to submit to an HIV test within 30 days after the person is so committed unless that person is in such custody because of having committed an AIDS transmitting crime and has already submitted to an HIV test pursuant to Code Section 17-10-15.

(c) No later than December 31, 1991, the department shall require to submit to an HIV test each person who has been committed to the custody of the commissioner to serve time in a penal institution of this state and who remains in such custody, or who would be in such custody but for having been transferred to the custody of the Department of

Human Resources (now known as the Department of Behavioral Health and Developmental Disabilities) under Code Section 42-5-52, if that person has not submitted to an HIV test following that person's most recent commitment to the custody of the commissioner and unless that person is in such custody because of having committed an AIDS transmitting crime and has already submitted to an HIV test pursuant to Code Section 17-10-15.

(d) Upon failure of an inmate to cooperate in HIV test procedures under this Code section, the commissioner may apply to the superior court for an order authorizing the use of such measures as are reasonably necessary to require submission to the HIV test. Nothing in this Code section shall be construed to limit the authority of the department to require inmates to submit to an HIV test.

(e) Any person determined by the department to be an HIV infected person, whether or not by the test required by this Code section, should be housed separately at existing institutions from any other persons not infected with HIV if:

(1) That person is reasonably believed to be sexually active while incarcerated;

(2) That person is reasonably believed to be sexually predatory either during or prior to incarceration; or

(3) The commissioner determines that other conditions or circumstances exist indicating that separate confinement would be in the best interest of the department and the inmate population,

but neither the department nor any officials, employees, or agents thereof shall be civilly or criminally liable for failing or refusing to house HIV infected persons separately from any other persons who are not HIV infected persons. (Code 1981, § 42-5-52.1, enacted by Ga. L. 1988, p. 1799, § 9; Ga. L. 2009, p. 453, § 3-24/HB 228.)

Editor's notes. — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the

fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the

General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection.”

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 134.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 78, 83, 84, 128, 129, 136, 140.

ALR. — Federal constitutional and statutory claims by HIV-positive inmates as to medical treatment or conditions of confinement, 162 ALR Fed. 181.

42-5-52.2. Testing of prison inmates for HIV; consolidation of inmates testing positive.

(a) For purposes of this Code section, “HIV” means HIV as defined by Code Section 31-22-9.1.

(b) The department shall implement an HIV testing program whereby any state inmate who has been in the custody of a state penal institution for one year or longer and who has not previously tested positive for HIV shall be tested for HIV within 30 days prior to his or her expected date of release from the custody of the department.

(c) Each person tested as provided in subsection (b) of this Code section shall be notified by the department in writing of the results of such testing prior to his or her release. Prior to the release of any person testing positive for HIV, the appropriate information as required by Code Sections 24-12-21 and 31-22-9.2 or other law shall be provided by the department to the Department of Public Health. Prior to the release of any person testing positive for HIV, the department shall also provide to such person in writing contact information regarding medical, educational, and counseling services available through the Department of Public Health. Any person testing positive for HIV shall be provided instruction relating to living with HIV, the prevention of the spread of such virus, and the legal consequences of infecting unknowing partners.

(d) The department shall seek state and federal grants or other possible sources of revenue for the purpose of funding a program of HIV testing authorized by this Code section. In addition, the department is authorized to accept gifts, subject to the approval of the board, for the purpose of funding such program.

(e) The department shall consolidate inmates who have tested positive for HIV in a manner that most efficiently provides education, counseling, and treatment for such persons.

(f) The provisions of this Code section shall not be construed to limit the provision for HIV testing in Code Section 42-9-42.1. (Code 1981,

§ 42-5-52.2, enacted by Ga. L. 2009, p. 611, § 1/SB 64; Ga. L. 2011, p. 99, § 61/HB 24; Ga. L. 2011, p. 705, § 6-3/HB 214.)

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, “Evi-

dence,” see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

42-5-53. Establishment of county correctional institutions; supervision by department; quota of inmates; funding; confinement and withdrawal of inmates.

(a) Subject to the provisions stated in this Code section, any county may purchase, rent, establish, construct, and maintain a county correctional institution for the care and detention of all inmates assigned to it by the department. The county may contract with other counties relative to the joint care, upkeep, and working of the inmates in such counties. Each county may pay its pro rata share of such expenses by taxes assessed and levied as provided by law.

(b) All county correctional institutions established by the counties as provided in subsection (a) of this Code section shall be subject to supervision and control by the department, and the board shall promulgate rules and regulations governing the administration and operation thereof.

(c)(1) Each county establishing a county correctional institution which complies with the rules and requirements established by the board and which is approved by the board shall receive a quota of inmates in accordance with such methods of apportionment as may be established by the board.

(2) The department is authorized, pursuant to rules and regulations adopted by the board, to pay funds, in an amount appropriated by the General Assembly for the purposes specified in paragraph (1) of this subsection, for each state inmate assigned to a county correctional institution to the county operating the facility. The amount so paid shall be determined on the basis of an equal amount per day for each state inmate assigned to the county correctional institution.

(3) Each county is authorized to use the money paid to it pursuant to paragraph (2) of this subsection for the operation and maintenance of the county correctional institution or may use the money so paid to supplant county funds or previous levels of county funding for the county correctional institution. Following a full hearing, the board is given the authority to withhold payment or withdraw all inmates

from any county correctional institution which does not at any time meet or comply with the rules, regulations, and requirements of the board or comply with its directions.

(d) In all cases in which an inmate is the sole responsibility of a county and the board has no authority, jurisdiction, or responsibility with respect to the sentence of the inmate, the county may confine the inmate in a county correctional institution established pursuant to this Code section. Counties without a county correctional institution may contract with counties having a county correctional institution to maintain the inmate.

(e) Nothing in this Code section shall be construed to prohibit the board from withdrawing inmates from any county correctional institution which does not at any time comply with the rules and regulations of the board promulgated pursuant to Code Section 42-5-10 or from withdrawing inmates from any county correctional institution which does not at any time meet the requirements of the board or comply with its directives. For reasons other than the failure to comply with the rules, regulations, requirements, and directives, the board is authorized to withdraw all inmates under its jurisdiction from all county correctional institutions under the following conditions:

(1) That such withdrawal shall include all inmates under the jurisdiction of the board assigned to all county correctional institutions and that the withdrawal shall be completed within one year after the effective date of the beginning of the withdrawal;

(2) That all county correctional institutions shall be notified at least one year in advance of the effective date of the beginning of the withdrawal;

(3) That each county affected by the withdrawal shall have the option of selling or leasing its county correctional institution to the department, provided the House Committee on State Properties and the Senate State Institutions and Property Committee shall certify to the department that the facility is suitable for inmate housing and provided, further, that the sale price of the facility or the lease rental payments for the facility shall be determined by a board of three appraisers selected as follows:

(A) One to be selected by the department;

(B) One to be selected by the governing authority of the county; and

(C) The third to be selected by the other two appraisers;

(4) That each county affected by the withdrawal shall have 30 days from the date of the issuance of the notice required by paragraph (2)

of this subsection to notify the department that the facility is to be sold to the department, the facility is to be leased to the department, or the county will keep and maintain the facility for its own use. If the department is not so notified within the time limitation, the department shall be under no obligation to lease or purchase the facility;

(5) That if the county elects to sell or lease the facility, the committees named in paragraph (3) of this subsection shall have 60 days from the time the department is notified of such decision in which to inspect the facility and make its recommendations and certification to the department;

(6) That if any such facility is leased by the department, the term of the lease, the requirements relative to the repair, maintenance, and improvements of the facility by the county, and the requirements relative to the renewal of the lease shall be as agreed upon by the department and the governing authority of the county; and

(7) That the sales price or lease rental payments for each facility and the requirements relative to the lease contract when the facility is leased shall be determined within six months after the issuance of the notice of the effective date of the beginning of the withdrawal required by paragraph (2) of this subsection and that, if they are not determined within the time limitation, the department shall be under no obligation to lease or purchase the facility. (Ga. L. 1956, p. 161, § 16; Ga. L. 1964, p. 491, § 1; Ga. L. 1970, p. 318, § 1; Ga. L. 1975, p. 908, § 1; Ga. L. 1980, p. 470, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1995, p. 10, § 42; Ga. L. 2009, p. 303, § 3/HB 117; Ga. L. 2013, p. 141, § 42/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted “House Committee on State Properties” for “State Institutions and Property Committee of the House of Representatives” in paragraph (e)(3).

Editor’s notes. — Ga. L. 2009, p. 303, § 20/HB 117, not codified by the General

Assembly, provides that: “This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act.”

JUDICIAL DECISIONS

DOC was immune from suit for negligence of county employees in handling state prisoner. — County that housed state inmates in the county’s prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq.; there-

fore, the State Department of Corrections was entitled to be dismissed from the inmate’s suit based on sovereign immunity. Ga. Dep’t of Corr. v. James, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

Cited in Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Wilkes County v.

Arrendale, 227 Ga. 289, 180 S.E.2d 548 (1971); Williams v. Georgia Dep't of Cors., 224 Ga. App. 571, 481 S.E.2d 272 (1997);

Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

OPINIONS OF THE ATTORNEY GENERAL

Distinction between state and county prisoners continues. — Ga. L. 1956, p. 161, § 23 and Ga. L. 1969, p. 598, § 1 (see now O.C.G.A. §§ 42-2-11 and 42-5-57) relate to "state prisoners" rather than "county prisoners"; the distinction between "state" and "county" prisoners continues in effect even though both may be confined in a county work camp (now county correctional institution). 1970 Op. Att'y Gen. No. U70-134.

Removal of prisoners from county institutions for failure to hire qualified warden. — If a county correctional institution fails to employ a warden who is duly qualified according to the requirements set forth by the board, the board may remove all the prisoners from that institution. 1973 Op. Att'y Gen. No. 73-41.

County rental of correctional institution. — This section expressly authorizes county to rent a public works camp (now county correctional institution), and does not require the county to obtain fee simple title as do the policies applicable to

property acquired and institutions conducted by the state itself. 1958-59 Op. Att'y Gen. p. 254.

Board's control over lease by county. — Terms of any lease are subject to approval and supervision of the Board of Corrections, and it is entirely a matter of policy for the board to determine as to whether a proposed lease is acceptable. 1958-59 Op. Att'y Gen. p. 254.

Use of city prisoners in county correctional institutions precluded. — Exceptions to the general category of prisoners set forth in subsection (a) of this section must be explicitly set forth in the statute, as was done for county prisoners in subsection (d) of this section; this would preclude the use of city prisoners in public works camps (now county correctional institutions). 1963-65 Op. Att'y Gen. p. 571.

County public works camps (now county correctional institutions) are not "detention facilities" and are to be regulated as the camps have been in the past by the Board of Corrections. 1973 Op. Att'y Gen. No. 73-117.

RESEARCH REFERENCES

ALR. — Institution for the punishment or rehabilitation of criminals, delin-

quents, or alcoholics as enjoined nuisance, 21 ALR3d 1058.

42-5-54. Information from inmates relating to medical insurance; provision and payment of medical treatment for inmates.

(a) As used in this Code section, the term:

(1) "Detention facility" means a county correctional institution, workcamp, or other county detention facility used for the detention of persons convicted of a felony or a misdemeanor.

(2) "Inmate" means a person who is detained in a detention facility by reason of being convicted of a felony or a misdemeanor and who is insured under existing individual health insurance, group health insurance, or prepaid medical care coverage or is eligible for benefits under Article 7 of Chapter 4 of Title 49, the "Georgia Medical

Assistance Act of 1977.” Such term does not include any sentenced inmate who is the responsibility of the Department of Corrections.

(3) “Officer in charge” means the warden, captain, or superintendent having the supervision of any detention facility.

(b) The officer in charge or his or her designee may require an inmate to furnish the following information:

(1) The existence of any health insurance, group health plan, or prepaid medical care coverage under which the inmate is insured;

(2) The eligibility for benefits to which the inmate is entitled under Article 7 of Chapter 4 of Title 49, the “Georgia Medical Assistance Act of 1977”;

(3) The name and address of the third-party payor; and

(4) The policy or other identifying number.

(c) The officer in charge will provide a sick, injured, or disabled inmate access to medical services and may arrange for the inmate’s health insurance carrier to pay the health care provider for the medical services rendered.

(d) The liability for payment for medical care described under subsection (b) of this Code section may not be construed as requiring payment by any person or entity, except by an inmate personally or by his or her carrier through coverage or benefits described under paragraph (1) of subsection (b) of this Code section or by or at the direction of the Department of Community Health pursuant to paragraph (2) of such subsection.

(e) Nothing in this Code section shall be construed to relieve the governing authority, governmental unit, subdivision, or agency having the physical custody of an inmate from its responsibility to pay for any medical and hospital care rendered to such inmate regardless of whether such individual has been convicted of a crime. (Code 1981, § 42-5-54, enacted by Ga. L. 1996, p. 1081, § 3; Ga. L. 1999, p. 296, § 24.)

Editor’s notes. — This former Code section, relating to temporary transfer of convicted persons pending appeals, was based on Ga. L. 1971, p. 341, § 2, and was repealed by Ga. L. 1982, p. 1364, § 3 effective January 1, 1983.

Law reviews. — For review of 1996 legislation relating to jails, see 13 Ga. St. U.L. Rev. 269 and 273 (1996).

JUDICIAL DECISIONS

Supervision of prisoners discretionary function. — Supervision of a prisoner work detail is a discretionary function by virtue of which the supervisor

is entitled to official immunity. *Parrish v. reversing Simmons v. Coweta County*, 229 State, 270 Ga. 878, 514 S.E.2d 834 (1999), Ga. App. 550, 494 S.E.2d 362 (1997).

42-5-55. Deductions from inmate accounts for payment of certain damages and medical costs; limit on deductions; fee for managing inmate accounts.

(a) As used in this Code section, the term:

(1) "Chronic illness" means an illness requiring care and treatment over an extended period of time. Chronic illness includes, but is not limited to, hypertension, diabetes, pulmonary illness, a seizure disorder, acquired immune deficiency syndrome, cancer, tuberculosis B, hepatitis C, rheumatoid arthritis, an autoimmune disorder, and renal disease.

(2) "Detention facility" means a state, county, or private correctional institution, workcamp, or other state or county detention facility used for the detention of persons convicted of a felony or a misdemeanor.

(3) "Inmate" means a person who is detained in a detention facility by reason of being convicted of a felony or a misdemeanor.

(4) "Medical treatment" means each visit initiated by the inmate to an institutional physician; physician's extender, including a physician assistant or a nurse practitioner; registered nurse; licensed practical nurse; medical assistant; dentist; dental hygienist; optometrist; or psychiatrist for examination or treatment.

(5) "Officer in charge" means the warden, captain, or superintendent having the supervision of any detention facility.

(b) The commissioner or, in the case of a county or private facility, the officer in charge may establish by rules or regulations criteria for a reasonable deduction from money credited to the account of an inmate to:

(1) Repay the costs of:

(A) Public property or private property in the case of an inmate housed in a private correctional facility willfully damaged or destroyed by the inmate during his or her incarceration;

(B) Medical treatment and prescription medication for injuries inflicted by the inmate upon himself or herself or others unless the inmate has a severe mental health designation as determined by the department;

(C) Searching for and apprehending the inmate when he or she escapes or attempts to escape; such costs to be limited to those extraordinary costs incurred as a consequence of the escape; or

(D) Quelling any riot or other disturbance in which the inmate is unlawfully involved; or

(2) Defray the costs paid by the state or county for:

(A) Medical treatment for an inmate when the request for medical treatment has been initiated by the inmate; and

(B) Medication prescribed for the treatment of a medical condition unrelated to pregnancy or a chronic illness.

(c) The provisions of paragraph (2) of subsection (b) of this Code section shall in no way relieve the governmental unit, agency, or subdivision having physical custody of an inmate from furnishing him or her with needed medical treatment.

(d) Notwithstanding any other provisions of this Code section, the deductions from money credited to the account of an inmate as authorized under subsection (b) of this Code section shall not be made whenever the balance in the inmate's account is \$10.00 or less.

(e) The officer in charge of any detention facility is authorized to charge a fee for establishing and managing inmate money accounts. Such fee shall not exceed \$1.00 per month. (Code 1981, § 42-5-55, enacted by Ga. L. 1996, p. 1081, § 3; Ga. L. 2003, p. 252, § 3; Ga. L. 2009, p. 136, § 1/HB 464; Ga. L. 2009, p. 859, § 3/HB 509.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, “; or” was added at the end of subparagraph (b)(1)(D).

Editor's notes. — This former Code section, relating to temporary transfer of convicted persons pending appeals and

requests by convicted person or his attorney for transfer, was based on Ga. L. 1971, p. 341, § 3, and Ga. L. 1974, p. 479, § 1. This former Code section was repealed by Ga. L. 1982, p. 1364, § 3, effective January 1, 1983.

42-5-56. Visitation with minors by convicted sexual offenders.

(a) As used in this Code section, the term “sexual offense” means a violation of Code Section 16-6-1, relating to the offense of rape; Code Section 16-6-2, relating to the offenses of sodomy and aggravated sodomy; Code Section 16-6-5.1, relating to the offense of sexual assault against a person in custody; Code Section 16-6-22, relating to the offense of incest; or Code Section 16-6-22.2, relating to the offense of aggravated sexual battery, when the victim was under 18 years of age at the time of the commission of any such offense; or a violation of Code Section 16-6-3, relating to the offense of statutory rape; Code Section 16-6-4, relating to the offenses of child molestation and aggravated child molestation; or Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes, when the victim was under 16 years of age at the time of the commission of any such offense.

(b) Any inmate with a current or prior conviction for any sexual offense as defined in subsection (a) of this Code section shall not be allowed visitation with any person under the age of 18 years unless such person is the spouse, son, daughter, brother, sister, grandson, or granddaughter of the inmate and such person is not the victim of a sexual offense for which the inmate was convicted. If visitation with a minor is restricted by court order, permission for special visitation with the minor may be granted only by the court issuing such order. (Code 1971, § 42-5-56, enacted by Ga. L. 1999, p. 591, § 1.)

Editor's notes. — The former provisions of this Code section, concerning temporary transfer of convicted persons pending appeal and adoption of rules and regulations by the board, were based on Ga. L. 1971, p. 341, § 4, and were repealed by Ga. L. 1982, p. 1364, § 3, effective January 1, 1983.

Administrative rules and regulations. — Visitation, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Institutional and Center Operations, Chapter 125-3-4.

42-5-57. Institution of rehabilitation programs; provision of opportunities for educational, religious, and recreational activities.

(a) The board, acting alone or in cooperation with the Department of Education, the Board of Regents of the University System of Georgia, or the several state, local, and federal agencies concerned therewith shall be authorized to institute a program of rehabilitation, which may include academic, industrial, mechanical, agricultural, and vocational training, within the confines of a penal institution.

(b) The department, in institutions under its control and supervision, shall give the inmates opportunity for reasonable educational, religious, and recreational activities where practicable. (Ga. L. 1956, p. 161, § 23; Ga. L. 1964, p. 734, § 1; Ga. L. 1968, p. 1399, § 4.)

JUDICIAL DECISIONS

Cited in *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968); *Krist v. Smith*, 309 F. Supp. 497 (S.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

Application to state prisoners. — Ga. L. 1956, p. 161, §§ 11 and 23 (see now O.C.G.A. §§ 42-2-11 and 42-5-57) relate to state prisoners rather than county prisoners; the distinction between "state" and "county" prisoners continues in effect even

though both may be confined in a county work camp (now county correctional institution). 1970 Op. Att'y Gen. No. U70-134.

Cost of instituting and maintaining academic programs in conjunction with the Board of Regents is a legal expendi-

ture for the Board of Offender Rehabilitation (Corrections). 1969 Op. Att'y Gen. No. 69-267.

Prison authorities' discretion to regulate religious activities. — Department of Offender Rehabilitation (Corrections) should not deny permission to all Jehovah's Witnesses' ministers to visit the prisons or to conduct services therein; however, the denial of permission in individual instances, in the discretion of prison authorities, would appear to be lawful as a valid exercise of the state's power to regulate religious activities for the safety and welfare of the state's citizens. 1967 Op. Att'y Gen. No. 67-270.

College attendance outside prison confines. — Provisions of this section are not sufficiently broad to include or permit inmates who may be qualified to attend college outside the confines of a state prison institution. 1967 Op. Att'y Gen. No. 67-119.

Development of service-type industrial programs. — Board of Corrections

is authorized to develop service-type industrial programs such as furniture refinishing, but such programs may not be developed by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

Criterion for judging whether work performed by prisoner is prohibited is not whether the articles on which prisoner is working are publicly or privately owned; the real test is whether the transaction was for a good faith purpose rather than a subterfuge designed to benefit the private owner. 1967 Op. Att'y Gen. No. 67-452.

Use of prison store profits. — Board of Corrections can use profits generated in a prison store to offset the expense of employing an athletic director to direct athletic activities of inmates by withdrawing such sums from the prison athletic fund and depositing the funds in the treasury of the Board of Corrections. 1969 Op. Att'y Gen. No. 69-314.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 32, 33, 36-45, 89, 90.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 59, 69, 89-92.

ALR. — Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Provision of religious facilities for prisoners, 12 ALR3d 1276.

42-5-58. Prohibition against corporal punishment; use of handcuffs, leg chains, and other restraints; permissible punishment generally.

(a) Whipping of inmates and all forms of corporal punishment shall be prohibited. All shackles, manacles, picks, leg irons, and chains shall be barred from use as punishment by any penal institution operated under authority of the board. In transferring violent or potentially dangerous inmates within an institution or between facilities, handcuffs, leg chains, waist chains, and waist belts may be utilized. Handcuffs, leg chains, waist chains, and waist belts may also be used in securing violent or potentially dangerous inmates within an institution and in public and private areas such as hospitals and clinics; but in no event may handcuffs, leg chains, waist chains, and waist belts be used as punishment; provided, however, if the accused becomes violent in the courtroom, restraints may be used.

(b) The department shall restrict punishment for an infraction of correctional rules and regulations to isolation and restricted diet or to uniform standard humane punishment which the department may deem necessary for the control of inmates. (Ga. L. 1956, p. 161, § 15; Ga. L. 1983, p. 1806, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1989, p. 14, § 42.)

Cross references. — Cruel and unusual punishment, U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Prohibition against whipping as punishment for crimes, Ga. Const. 1983, Art. I, Sec. I, Para. XXI. Penalty for as-

sault by state officer under color of office or commission, § 45-11-3.

Law reviews. — For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1910, § 1176 are included in the annotations for this Code section.

One in charge of state convicts cannot act with unlawful evidence towards a person under one's control; and if one does so, he may be guilty of a punishable offense. *Loeb v. Jennings*, 133 Ga. 796, 67 S.E. 101, 18 Ann. Cas. 376 (1910), *aff'd*, 219 U.S. 582, 31 S. Ct. 469, 55 L. Ed. 345 (1911).

Corporal punishment. — Warden has no authority to administer corporal punishment to a convict, except such as may be reasonably necessary to compel the convict to work or to maintain proper discipline. Therefore, corporal punishment of a convict by a warden, adminis-

tered when the circumstances are not of a character sufficient to authorize such punishment is an assault. *Westbrook v. State*, 133 Ga. 578, 66 S.E. 788, 25 L.R.A. (n.s.) 591, 18 Ann. Cas. 295 (1909).

Whipping of child by parents with court-supplied strap. — Judge is in violation of O.C.G.A. § 42-5-58 when the judge permits parents to whip an eight-year-old child with a court-supplied strap, rather than subjecting the child to incarceration and a criminal record. In *re Ellerbee*, 248 Ga. 246, 282 S.E.2d 313 (1981).

Cited in *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *Patterson v. MacDougall*, 506 F.2d 1 (5th Cir. 1975); *Jenkins v. Department of Cors.*, 238 Ga. App. 336, 518 S.E.2d 730 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 119, 122-127.

C.J.S. — 18 C.J.S., Convicts, § 15. 72 C.J.S., Prisons and Rights of Prisoners, §§ 19, 20, 24, 25, 60.

ALR. — Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Prison conditions as amounting to cruel and unusual punishment, 51 ALR3d 111.

42-5-59. Employment of inmates in the local community.

(a) The commissioner shall extend the limits of the place of confinement of an inmate, if there is reasonable cause to believe the inmate will honor his trust, by authorizing the inmate, under prescribed conditions, to work at paid employment or participate in a training

program in the community on a voluntary basis while continuing as an inmate of the institution to which he is committed, provided that:

(1) Representatives of local union central bodies or similar labor union organizations are consulted;

(2) The paid employment will not result in the displacement of employed workers, be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(3) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is to be performed.

(b) An inmate authorized to work at paid employment in the community under subsection (a) of this Code section shall comply with all rules and regulations promulgated by the board relative to the handling, disbursement, and holding in trust of all funds earned by the inmate while under the jurisdiction of the department. An amount determined to be the cost of the inmate's keep and confinement shall be deducted from the earnings of each inmate, and such amount shall be deposited in the treasury of the department; provided, however, that, if the inmate is assigned to a county correctional institution, the deducted amount shall be deposited in the treasury of the county to which the inmate is assigned. After the deduction for keep and confinement, the commissioner shall:

(1) Allow the inmate to draw from the balance a reasonable sum to cover his incidental expenses;

(2) Retain to the inmate's credit an amount as is deemed necessary to accumulate a reasonable sum to be paid to him on his release from the penal institution;

(3) Deduct from the inmate's funds any amounts necessary to cover the costs of medical or dental attention provided to the inmate, said deductions to be made in accordance with policies and procedures promulgated by the commissioner; and

(4) Cause to be paid any additional balance as is needed for the support of the inmate's dependents.

(c) No inmate employed in the community under subsection (a) of this Code section shall be deemed to be an agent, employee, or involuntary servant of the department while working in the community or going to and from his employment.

(d) The willful failure of an inmate to remain within the extended limits of his confinement or to return within the time prescribed to an institution designated by the commissioner shall be deemed an escape

from a penal institution and shall be punishable by law. (Ga. L. 1956, p. 161, § 13; Ga. L. 1968, p. 1399, § 1; Ga. L. 1969, p. 602, § 1; Ga. L. 1971, p. 435, § 1; Ga. L. 1973, p. 1299, § 1; Ga. L. 1986, p. 1596, § 1; Ga. L. 1994, p. 97, § 42.)

Law reviews. — For annual survey on workers' compensation, see 61 Mercer L. Rev. 399 (2009).

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Confinement even when participating in work release programs. — Even when an inmate was physically at a bakery on a work release program, the inmate was still legally "confined" under O.C.G.A. § 42-5-59(a). Thus, there was no error in finding that the inmate's participation in the work release program was part of the inmate's punishment and that, as a result,

the inmate was not entitled to workers' compensation benefits. *Clarke v. Country Home Bakers*, 294 Ga. App. 302, 669 S.E.2d 177 (2008).

Cited in *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979); *Wise v. Balkcom*, 245 Ga. 126, 263 S.E.2d 158 (1980); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Statutory provisions mandatory. — Language of Ga. L. 1968, p. 1399, § 1 (see now O.C.G.A. §§ 42-5-50 42-5-51, and 42-5-59) is mandatory. 1977 Op. Att'y Gen. No. 77-71.

Performance of federal contracts. — This section fully complies with requirements set forth in Executive Order 11755 which provides that nonfederal prison inmates may be employed in performance of federal contracts if the inmate participates in the work-release program on a voluntary basis, if representatives of local labor organizations have been consulted, if the inmate's employment will not result in the displacement of employed workers or result in a surplus of laborers in the locality, and if the rates of pay and other conditions of employment are not less than those provided for similar work in the locality. 1974 Op. Att'y Gen. No. 74-125.

Work-release programs. — County may not recover the county's expenses in maintaining prisoners employed in work-release programs. 1969 Op. Att'y Gen. No. 69-248.

Room and board charges of prisoners on work release must be deposited into the state treasury. 1969 Op. Att'y Gen. No. 69-363.

Work-release program does not authorize compensation of inmates for work performed in institutions. 1973 Op. Att'y Gen. No. 73-7.

There is no authority for the superintendent of a correctional institution to allow work releasees to reside in their homes; a work releasee shall continue to be a prisoner of the institution to which the releasee has been committed. 1974 Op. Att'y Gen. No. 74-116.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 139.

ALR. — Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory, 95 ALR 1455.

What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

42-5-60. Hiring out of inmates; participation of inmates in programs of volunteer service; sale of products produced by inmates; disposition of proceeds; payment to inmates for services.

(a)(1) The board shall provide rules and regulations governing the hiring out of inmates by any penal institution under its authority to municipalities, cities, the Department of Transportation, and any other political subdivision, public authority, public corporation, agency, or state or local government, which entities are authorized by this subsection to contract for and receive the inmates. Such inmates shall not be hired out to private persons or corporations, nor shall any instrumentality of government authorized by this subsection to utilize penal labor use such labor in any business conducted for profit, except as provided in Code Section 42-5-59; provided, however, that:

(A) Inmate trainees enrolled in any vocational, technical, or educational training program authorized and supported by the department may repair or otherwise utilize any privately owned property or equipment as well as any other property or equipment in connection with the activities of any such training program, so long as the repair or utilization contributes to the inmate's acquisition of any desired vocational, technical, or educational skills; and

(B) To the extent authorized by the rules and regulations of the board, inmates may be allowed to participate in programs of volunteer service as authorized by this subparagraph. The rules and regulations of the board shall prescribe criteria for nonprofit organizations eligible to receive volunteer services. Such criteria shall require that any participating nonprofit organization be qualified as exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986 and shall give consideration in determining eligibility to the nonprofit organization's history of service activities and the length of time for which it has been in existence and providing such services. Any such volunteer service program shall include elements whereby the volunteer inmates provide services of benefit to the community while receiving training or work experience suitable for their rehabilitation. The board may authorize such voluntary inmate participation, notwithstanding the fact that the nonprofit organization may receive direct or indirect payment as a result of such inmate participation; notwithstanding the fact that the services rendered may provide some degree of benefit to private individuals or organizations or both; and notwithstanding the fact that some inmate participation may take place outside the confines of a penal institution.

(2) Notwithstanding any other provisions of this subsection, any private person, organization, or corporation with whom the commis-

sioner has contracted for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state prison or for any services related to the custody, care, and control of inmates as authorized by Code Section 42-2-8 may utilize penal labor in the same manner as any such labor may be utilized by any other penal institution operated under the authority of the board. Agreements made pursuant to Code Section 42-2-8 for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state prison or for any services related to the care, custody, and control of inmates shall factor the value of penal labor such that the state is the only financial beneficiary of the same.

(b) No goods, wares, or merchandise which have been manufactured, produced, or mined, wholly or in part, by the inmates of any state or county correctional institution operated under the jurisdiction of the board shall be sold in this state to any private person, firm, association, or corporation, except that this prohibition shall not apply to:

- (1) Sales to private colleges and universities;
- (2) A sale to a private contractor of goods, wares, or merchandise for use in the completion of a publicly funded project; or
- (3) Sales to privately owned correctional facilities that house inmates from the State of Georgia.

Nothing in this subsection shall be construed to forbid the sale of such goods or merchandise to other political subdivisions, public authorities, municipalities, or agencies of the state or local governments to be consumed by them or to agencies of the state to be in turn sold by the agency to the public in the performance of the agency's duties as required by law. This subsection does not prohibit the sale of unprocessed agricultural products produced on state property.

(c) Funds arising from the sale of goods or other products manufactured or produced by any state correctional institution operated by the department shall be deposited with the treasury of the department. The funds arising from the sale of goods and products produced in a county correctional institution or from the hiring out of inmates shall be placed in the treasury or depository of the county, as the case may be. The department is authorized, pursuant to rules and regulations adopted by the board, to pay compensation of not more than \$25.00 per month from funds available to the department to each inmate employed in any industry.

(d) Any superintendent, warden, guard, official, or other person who violates this Code section or any regulations promulgated pursuant thereto, relating to the sale of goods or products manufactured or produced in a correctional institution or the hiring out of inmates, shall be guilty of a misdemeanor.

(e) The department or any state correctional institution or county correctional institution operating under jurisdiction of the board shall be authorized to require inmates coming into its custody to labor on the public roads or public works or in such other manner as the board may deem advisable, including without limitation any labor authorized under Chapter 15A of Title 17. The department may also contract with municipalities, cities, counties, the Department of Transportation, or any other political subdivision, public authority, public corporation, or agency of state or local government created by law, which entities are authorized by this Code section to contract with the department, for the construction, repair, or maintenance of roads, bridges, public buildings, and any other public works by use of penal labor.

(f) Any provision of this chapter to the contrary notwithstanding, any inmate of any state or county correctional institution operated under the jurisdiction of the board may sell goods, wares, and merchandise created by such inmate through the pursuit of a hobby or recreational activity. The proceeds from the sales shall be distributed to the particular inmate who created the goods, wares, or merchandise. The board is authorized to promulgate rules and regulations governing the sale of such goods, wares, and merchandise and the distribution of the proceeds from the sales. All goods, wares, and merchandise created by an inmate must be sold within the institution or on the institution grounds during visiting hours or when on off-duty assignments. (Ga. L. 1956, p. 161, § 22; Ga. L. 1957, p. 477, § 4; Ga. L. 1968, p. 1092, § 1; Ga. L. 1968, p. 1399, §§ 2, 3; Ga. L. 1971, p. 581, § 1; Ga. L. 1972, p. 577, § 1; Ga. L. 1984, p. 651, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1992, p. 6, § 42; Ga. L. 1993, p. 629, § 1; Ga. L. 1997, p. 851, § 2; Ga. L. 2000, p. 1584, § 1; Ga. L. 2001, p. 1090, § 1; Ga. L. 2003, p. 252, § 4.)

Cross references. — Hiring out of inmates for public road projects, §§ 32-4-42, 32-4-91. Correctional Industries, T. 42, C. 10. Use of inmate labor to abate hazard presented by abandoned well or hole, § 44-1-14.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 230 (1997).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1882, § 4310, former Penal Code 1895, § 1137 et seq., and former Penal Code 1910, § 1166 are included in the annotations for this Code section.

Charge against county for labor. — There was nothing in former Penal Code 1895, § 1137 et seq. authorizing or requir-

ing a charge to be made against a county for the labor of misdemeanor convicts sentenced by the courts in such county to work on the county's chain gang (now county facilities or programs). *Binns v. Ficklen*, 130 Ga. 377, 60 S.E. 1051 (1908) (decided under former Penal Code 1895, § 1137 et seq.).

Convict cannot be hired out to a private individual. *County of Walton v.*

Franklin, 95 Ga. 538, 22 S.E. 279 (1894) (decided under former Code 1882, § 4310).

Law requiring county to pay for hire of misdemeanor convicts. — Special law requiring the county to pay for hire of misdemeanor convicts was unconstitutional, there being a general law relating to this subject. *Binns v. Ficklen*, 130 Ga. 377, 60 S.E. 1051 (1908) (decided under former Penal Code 1895, § 1137 et seq.).

Supervision of prisoners discretionary function. — Supervision of a prisoner work detail is a discretionary function by virtue of which the supervisor is entitled to official immunity. *Parrish v. State*, 270 Ga. 878, 514 S.E.2d 834 (1999), reversing *Simmons v. Coweta County*, 229 Ga. App. 550, 494 S.E.2d 362 (1997).

Cited in *Williams v. Georgia Dep't of Cors.*, 224 Ga. App. 571, 481 S.E.2d 272 (1997).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

RULES GOVERNING HIRING OUT INMATES

1. IN GENERAL
2. PUBLIC WORKS
3. PRIVATE ENDEAVORS

SALE OF INMATES' PRODUCTS

1. IN GENERAL
2. WITHIN STATE
3. OUTSIDE OF STATE

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, opinions decided under former Code 1933, § 77-325 are included in the annotations for this Code section.

Negotiation for use of prison labor in roads construction. — Any agreement for the use of prison labor in constructing roads by the state must be negotiated by the Highway Department (now Department of Transportation) and the governmental unit having custody of the prisoners. 1969 Op. Att'y Gen. No. 69-5.

Board is authorized to develop service-type industrial program such as furniture refinishing, but such programs may not be developed by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

Transporting prisoners to job site. — No legal problem exists in transporting prisoners by barge to a job site. 1969 Op. Att'y Gen. No. 69-5.

Rules governing payments to inmates. — Place of confinement is irrelevant; if a state prisoner is engaged in an

endeavor which may be classified as "industry," the prisoner would be eligible for incentive pay upon the adoption of an appropriate administrative rule; state prisoners confined in county public works camps (now county correctional institutions), would be paid from funds available to the board as no provision was made for payments from county funds. 1968 Op. Att'y Gen. No. 68-464.

Rules Governing Hiring Out Inmates

1. In General

Board prescribes conditions of work required of prisoners and retains administrative responsibility, etc., of prisoners. In view of the broad language found in subsection (e) of Ga. L. 1957, p. 477, § 4 (see now O.C.G.A. § 42-5-60) that prison labor could be required in public buildings in any such manner as deemed advisable by the Board of Offender Rehabilitation (Corrections), it is obvious that the legislature intended the board to prescribe the conditions of work required of the prisoners; and even though some of the prisoners are physically restrained for overnight periods in county jails, their primary as-

signment is, nonetheless, to the prison or public work camp (now county correctional institution) as determined by the commissioner; in turn the prison or camp has sole administrative responsibility and control of the prisoner even though the prisoner be temporarily attached to the county jail to perform the required repair or maintenance services; such a temporary attachment is not an assignment which contravenes the language of subsection (b) of Ga. L. 1956, p. 161, § 13 (see now O.C.G.A. § 42-5-50). 1963-65 Op. Att'y Gen. p. 72.

Use of prison labor for governmental functions. — Prison labor may be used only in connection with those services and functions of municipalities which are deemed "governmental" in nature as opposed to "ministerial" functions which are those performed by municipalities for profit. 1963-65 Op. Att'y Gen. p. 632.

"Hiring" defined. — Indispensable element of "hiring" is the rendering of services for compensation or something in return — a quid pro quo. 1960-61 Op. Att'y Gen. p. 349.

Permissible use of prisoners. — This section includes no prohibition to the use of prisoners on road projects when federal funds are involved. 1965-66 Op. Att'y Gen. No. 65-52.

Prohibited use of prisoners. — Prisoners in the Georgia penal system may not be leased to the United States Forest Service, which is an agency of the United States government. 1967 Op. Att'y Gen. No. 67-451.

2. Public Works

Public work defined. — Courts will hold a public work to be any project upon which public funds could be lawfully expended; the underlying factual issue will always be the extent, if any, to which the public will receive common or corporate benefit. 1969 Op. Att'y Gen. No. 69-470.

Granting of an "easement" must not be taken as conclusively establishing the public nature of a works project. 1969 Op. Att'y Gen. No. 69-470.

Permissible works for use of inmates. — It is legally permissible to use inmates of the prison system for daily

civic labor in and about a municipality in exchange for the use by the Board of Offender Rehabilitation (Corrections) of an existing prison facility owned by the municipality. 1963-65 Op. Att'y Gen. p. 632.

Presentment of educational programs to civic clubs. — Inmates in the Georgia prison system may, at the discretion of appropriate prison officials, present educational programs to civic clubs, even though the presentation may be in a privately owned facility. 1969 Op. Att'y Gen. No. 69-221.

Erection of hospitals. — Convict labor may be used, under control of county authorities, in erection of hospital by the county hospital authority. 1945-47 Op. Att'y Gen. p. 422 (decided under former Code 1933, § 77-325 prior to revision by Ga. L. 1956, p. 161, § 22).

Building or repairing schools. — County may permit use of convicts in building or repairing a public school building in a municipality if the convicts remain under the control and management of the county authorities. 1945-47 Op. Att'y Gen. p. 423.

Prison labor may be utilized to construct roads on land owned by the state. 1969 Op. Att'y Gen. No. 69-5.

Felony convicts may be used in the maintenance of roads in the state-aid system. 1945-46 Op. Att'y Gen. p. 424.

Inmates may be required to perform labor upon prison property, including the preparation of mobile home sites, if that is what is desired of their labors. 1969 Op. Att'y Gen. No. 69-418.

Farming. — Board of Corrections may enter into an agreement with a county whereby the county gives the prison a crop allotment and allows the prison to farm county property, furnishing the fertilizer and equipment for gathering the crop and in return for which, the county is to receive a portion of the crop grown on the property, with the remainder to be consumed within the prison branch. 1970 Op. Att'y Gen. No. 70-83.

Use of convict labor on private property is permissible when the sole benefit flows to the state, and it is the duty of the Board of Offender Rehabilitation (Corrections) to examine each set of facts

Rules Governing Hiring Out**Inmates (Cont'd)****2. Public Works (Cont'd)**

and determine whether the state is benefiting in the necessary degree. 1965-66 Op. Att'y Gen. No. 66-119.

3. Private Endeavors

Use of convict labor on private property is permissible when the sole benefit flows to the state. 1969 Op. Att'y Gen. No. 69-158.

Removal and resetting of fences. — Highway Department (now Department of Transportation) can contract with private property owner to use prison labor or state maintenance forces to remove and reset fences upon private property which is to be used as right of way since the utilization of prison labor is to the benefit of the state; the department cannot guarantee to a county that it will perform these acts or expend this money if a county in turn entered into such an agreement with the private landowner which guaranteed to the private landowner that the state would perform such acts. 1969 Op. Att'y Gen. No. 69-158.

Removal of buildings. — This section would not prohibit use of prison labor to remove a building from private property and to reerect the building on state property when the sole benefit would flow to the state. 1958-59 Op. Att'y Gen. p. 250.

Clearing land. — City not prohibited from using prison labor to clear private land under local health ordinance so long as transaction is for good faith public purpose, rather than a subterfuge designed to benefit the private owner. 1958-59 Op. Att'y Gen. p. 248.

Agreement between warden of prison branch and private landowner, whereby in consideration of warden's clearing five acres of land belonging to landowner, the landowner will permit prison branch to occupy land rent free for period of three years, is not illegal so long as the agreement was entered into in good faith, for the purpose of procuring the use of land for the state, rather than as a guise whereby the private landowner is enabled to receive a gratuity from the state, prohibited by Ga. Const. 1976, Art. III, Sec.

VIII, Para. XII (see now Ga. Const. 1983, Art. III, Sec. VI, Para. VI). 1958-59 Op. Att'y Gen. p. 248.

Soil conservation projects. — It is legal to utilize convict labor to remove buildings on private land in connection with soil conservation projects being conducted by soil conservation district supervisors for the purpose of constructing water impounding structures and flooding pools since soil conservation districts are expressly declared to be agencies of the state government by Ga. L. 1937, p. 377, §§ 3 and 8 (see now O.C.G.A. §§ 2-6-22 and 2-6-33), whose powers and duties include the erection of soil conservation structures. 1958-59 Op. Att'y Gen. p. 250.

Use of inmate labor to position and level a correctional officer's mobile home site on prison property is not a violation of Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see now Ga. Const. 1983, Art. III, Sec. VI, Para. VI). 1969 Op. Att'y Gen. No. 69-418.

Convict labor may be used for construction of school gymnasium though private contractor constructing when there are no disbursements or credits for use of such labor between board of education and contractors. 1962 Op. Att'y Gen. p. 379.

Corporation within prohibited category. — Although a corporation is imbued with a community purpose and no profit is contemplated by the stockholders, it is nevertheless clearly within the prohibited category of private persons or corporation. 1963-65 Op. Att'y Gen. p. 317.

Prison labor could not be used in home for aged and infirm to be constructed by county and operated by charitable organization when control and management of home would be in hands of directors of organization; any arrangement whereby the custody, control, and labor of prisoners are vested in private parties would be illegal, and the prisoners would be entitled to relief by habeas corpus. 1958-59 Op. Att'y Gen. p. 246.

Solid waste management facility. — Inmate labor may not be used to work for a solid waste management facility that is operated by a private, for-profit entity, if the labor inures to the benefit of the entity. 1999 Op. Att'y Gen. No. 99-12.

Manufacture of tags for private sale. — Board of Offender Rehabilitation (Corrections) is prohibited from manufacturing tags in the penal institutions of this state for private sale to any person including charitable organizations such as the Veterans of Foreign Wars. 1952-53 Op. Att'y Gen. p. 400 (decided under former Code 1933, § 77-325).

Using prisoners for work on private highways. — Counties may not use prison labor to repair and maintain private driveways which have not been validly dedicated to public use. 1963-65 Op. Att'y Gen. p. 426.

Work on private vehicles. — It is not permissible for inmates of a training and development center for state prisoners to perform work on private vehicles to obtain practice in carrying out procedures learned in the automobile school. 1967 Op. Att'y Gen. No. 67-452.

Sale of Inmates' Products

1. In General

Manufacturing operations conducted by Board of Corrections. — This section is applicable to manufacturing operations conducted by a prison operated by the Board of Corrections other than those manufacturing activities which are carried on by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1968 Op. Att'y Gen. No. 68-126.

Use of inmates in civilian business. — Real thrust of this prohibition is against actual use of inmates in a civilian business. 1972 Op. Att'y Gen. No. 72-96.

Canned and packed vegetables distinguished. — Canned vegetables are "goods, wares, or merchandise", and packed vegetables are considered "manufactured" or "produced". 1965-66 Op. Att'y Gen. No. 65-28.

"Goods, wares, or merchandise" construed. — Phrase "goods, wares, or merchandise", as set out in subsection (b) of this section, should be construed in its ordinary sense; this means such chattels as are ordinarily the subject of traffic and trade. 1972 Op. Att'y Gen. No. 72-96.

Board is authorized to sell to a municipality goods, wares, or merchandise

manufactured, produced, or mined, wholly or in part, by convicts or prisoners. 1954-56 Op. Att'y Gen. p. 530 (decided under former Code 1933, § 77-325).

Hospital authorities may purchase goods manufactured by the Georgia Correctional Industries Administration. 1970 Op. Att'y Gen. No. 70-88.

2. Within State

Selling products produced by prison labor to other departments. — Board of Offender Rehabilitation (Corrections) is authorized to sell to other departments of the state government any products produced by prison labor in a program of occupational and vocational training. 1948-49 Op. Att'y Gen. p. 286 (decided under former Code 1933, § 77-325).

Solicitation of paid advertisement in inmate publication. — Restrictions on the sale of goods produced by inmates do not prohibit the solicitation and acceptance of paid advertising in an inmate publication. 1972 Op. Att'y Gen. No. 72-96.

3. Outside of State

Sale of goods outside state. — Although this section does not prohibit the sale of goods, wares, or merchandise manufactured by inmates to firms or corporations outside the state, the words "no goods shall be sold in this state" indicate that no sale can be perfected. 1965-66 Op. Att'y Gen. No. 66-237.

Goods packed out of state. — Subsections (b) and (d) of this section do not relate to goods which have been packed outside of this state by prison labor of another state. 1965-66 Op. Att'y Gen. No. 65-28.

Sales to factories for the blind. — Georgia Correctional Industries Administration may be authorized to sell prisoner-made products to factories for the blind located in other states, providing the local state law does not prohibit the sale of prisoner-manufactured goods. 1974 Op. Att'y Gen. No. 74-157.

Sales to government contractors. — There are no prohibitions in existence under statutes of this state restricting

Sale of Inmates' Products (Cont'd)**3. Outside of State (Cont'd)**

sales of products manufactured or produced by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration) to government contractors outside the state. 1967 Op. Att'y Gen. No. 67-349.

Sales made outside state excluded.

— Due to the fact that subsection (b) of

this section prohibits only sales within the state to private persons, firms, associations, or corporations it is to be concluded that this expressed prohibition is to be construed as to the extent of the legislature's sanctions on sales of prison made or produced products and, therefore, that any sales made beyond the state are excluded from these prohibitions. 1967 Op. Att'y Gen. No. 67-349.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 141-149.

C.J.S. — 18 C.J.S., Convicts, §§ 2, 16-24.

42-5-60.1. Utilization of inmates of county correctional institutions for work on outdoor assignments during inclement weather; supervision of inmates.

(a) As used in this Code section, the term "inclement weather" means weather in which there is rain or in which the temperature is below 28 degrees Fahrenheit.

(b) Inmates of a county correctional institution who are otherwise required to work on outdoor assignments shall work on such assignments notwithstanding inclement weather if employees of any governmental entity within the county in which the work is to be performed are performing outdoor work during such inclement weather and such work is similar in kind or in degree of exertion to that to be performed by the inmates.

(c) Correctional officers and other supervisory personnel shall be available to supervise adequately those inmates performing outdoor work in inclement weather. (Ga. L. 1981, p. 1421, § 1.)

42-5-61. Services and benefits to be furnished inmates discharged by department or county correctional institutions.

(a) Except as otherwise provided in this Code section, whenever an inmate is discharged upon pardon or completion of his sentence or is conditionally released or paroled from any place of detention to which he has been assigned under the authority of the department, the department shall provide the inmate the following:

- (1) Transportation to the inmate's home within the United States or to a place chosen by the inmate and authorized by regulations of the board;

(2) An amount of money of not less than \$25.00 and not more than \$150.00, as determined according to regulations of the board; and

(3) A travel kit, when appropriate, and suitable clothing, each as provided by regulation of the board.

(b) Whenever an inmate assigned to a county correctional institution by the department is discharged upon pardon or completion of his sentence or is conditionally released or paroled, the county shall provide the inmate the release benefits to which he is eligible under this Code section, and the department shall reimburse the county.

(c) An inmate whose limits of confinement have been extended to allow him to participate in a work-release program of paid employment shall receive the benefits provided by this Code section only to the extent of financial need, as determined pursuant to regulations of the board.

(d) An inmate convicted of an offense which is less than a felony shall receive the amount of \$25.00 or less as determined under regulations of the board and transportation as provided in this Code section.

(e) The department shall administer these benefits through regulations which are based upon the knowledge and skill of the board in aiding an inmate to make the initial adjustment to his release. (Ga. L. 1956, p. 161, § 21; Ga. L. 1969, p. 600, § 1; Ga. L. 1972, p. 602, § 1; Ga. L. 1973, p. 542, § 1.)

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Legislative intent. — This statute was intended to alleviate hardships which prisoners encounter on reentry into free society; this policy would apply to a second release as well as a first, especially the inmate who was unsuccessful in the inmate's first attempt to make the social adjustment to freedom. 1972 Op. Att'y Gen. No. 72-102.

Issuance of suitable clothing to inmates released. — This section permits the Board of Offender Rehabilitation (Corrections) to issue either work clothes or a business suit to inmates who are discharged, paroled, or conditionally released. 1972 Op. Att'y Gen. No. 72-160.

Second release inmates entitled to benefits. — Inmate who has been paroled, conditionally released, or released on probation, and upon release has been given benefits pursuant to this section, and who has been returned to prison for violation of the conditions of release, is

again entitled to receive benefits under this statute upon the completion of the inmate's sentence, provided the inmate is otherwise qualified. 1972 Op. Att'y Gen. No. 72-102.

Prisoner released upon payment of fine may fall within the category of prisoner "discharged upon completion of sentence" or within the category of a "conditionally released" prisoner, depending upon the particular order entered to effectuate the release; prisoners discharged in these categories with reference to discharge by payment of a fine are entitled to the benefits provided by this section. 1969 Op. Att'y Gen. No. 69-245.

Other released inmates entitled to benefits. — Inmates being released from county jails who were committed to the director of corrections (now commissioner of corrections) and who have had files prepared for the inmates by the Georgia Diagnostic and Classification Center, but

who have not been picked up by the center, are entitled to the gratuities provided in this section. 1975 Op. Att'y Gen. No. 75-93.

Prisoner who is released "by reason of remission to probation" is entitled to the benefits provided for in this section. 1969 Op. Att'y Gen. No. 69-245.

Prisoner who is discharged by an order of "remission to present ser-

vice" is entitled to the benefits provided for by this section. 1969 Op. Att'y Gen. No. 69-245.

Prisoner released to a detainee is not entitled to benefits provided by this section; it is not contemplated that the state prison uniform will be taken away from a prisoner released under this category. 1969 Op. Att'y Gen. No. 69-245.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 153.

42-5-62. Forfeiture of contraband.

The possession by an inmate on his person or in his cell, immediate sleeping area, locker, or immediate place of work or assignment of any form of securities, bonds, coins, currency, or legal tender, unless expressly and specifically authorized by the individual institution concerned, shall constitute contraband and be subject to forfeiture. With respect to state correctional institutions, all such securities, bonds, coins, currency, or legal tender shall vest in the state and shall be paid into the state treasury. With respect to county correctional institutions, all such currency and other items shall vest in the county and shall be paid into the county treasury. (Ga. L. 1980, p. 1095, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 95.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 73.

42-5-63. Unauthorized possession of weapon by inmate.

(a) Every person confined in a penal institution or confined in any other facility under the jurisdiction of or subject to the authority of the board or who, while being conveyed to or from any facility, or while at any other location under such jurisdiction or authority, or while being conveyed to or from any such place, or while under the custody of officials, officers, or employees subject to such jurisdiction or authority, who, without authorization of the appropriate authorities, possesses or carries upon his person or has under his custody or control any instrument or weapon of the kind commonly known as a blackjack, slingshot, billy, sandclub, sandbag, or knuckles whether made from metal, thermoplastic, wood, or other similar material; or any pistol, revolver, or other firearm; or any explosive substance; or any dirk, dagger, switchblade, gravity knife, razor, or any other sharp instrument

which is capable of such use as may endanger the safety or security of any of the facilities described in this subsection or of any person therein shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a term of not less than one nor more than five years.

(b) A person is deemed “confined in a penal institution” if he is confined in any of the penal institutions specified in subsection (a) of this Code section by order made pursuant to law, regardless of the purpose of the confinement and regardless of the validity of the order directing the confinement, until a judgment of a competent court setting aside the order becomes final so as to entitle the person to his immediate release.

(c) A person is deemed “confined in” a penal institution even if, at the time of the offense, he is temporarily outside its walls or bounds for the purpose of confinement in a local place of confinement pending trial or for any other purpose for which an inmate may be allowed temporarily outside the walls or bounds of a penal institution; but an inmate who has been released on parole is not deemed “confined in” a penal institution for purposes of this Code section. (Ga. L. 1973, p. 555, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 2008, p. 533, § 3/SB 366.)

Cross references. — Penalty for possession of firearms by convicted felons, § 16-11-131.

JUDICIAL DECISIONS

Constitutionality. — This section, which prohibits prison inmates from having deadly weapons, does not violate the equal protection clause of U.S. Const., amend. 14. *Ridley v. State*, 232 Ga. 646, 208 S.E.2d 466 (1974).

This section is not unconstitutionally vague or indefinite, and is consistent with due process requirements of both state and federal Constitutions, and is reasonable and necessary for the security and protection of correctional institutions and the people who reside and work in such institutions. *Ridley v. State*, 232 Ga. 646, 208 S.E.2d 466 (1974).

Making out a prima facie case. — On indictment under this section, proof that the defendant, a convict, was searched while passing from one building to another, and a knife meeting the description of this section was found on the defendant's person, makes out a prima facie

case. If the defendant claims authorized possession, the burden is on the defendant to offer evidence to that effect. *Days v. State*, 134 Ga. App. 585, 215 S.E.2d 520 (1975).

Subsection (b) of O.C.G.A. § 42-5-63 does not make production of an order an essential element of the crime which must be admitted into evidence at trial. *Lehman v. State*, 174 Ga. App. 767, 332 S.E.2d 17 (1985).

Offense not lesser included offense of aggravated assault. — Offense of unauthorized possession of weapon by inmate is not a lesser included offense of aggravated assault. *Weaver v. State*, 176 Ga. App. 639, 337 S.E.2d 420 (1985).

Fact that weapon was found in defendant's locker, which was locked, with the defendant having the only key save a master key used by prison officials, was sufficient evidence to establish that the

defendant had exclusive custody and control of the weapon. *Black v. State*, 179 Ga. App. 170, 345 S.E.2d 678 (1986).

Evidence was sufficient to sustain conviction. — See *Hood v. State*, 192 Ga. App. 150, 384 S.E.2d 242 (1989); *Dixon v. State*, 192 Ga. App. 845, 386 S.E.2d 719 (1989).

Cited in *Chaney v. State*, 139 Ga. App. 211, 228 S.E.2d 199 (1976); *Mathis v. State*, 139 Ga. App. 322, 228 S.E.2d 358 (1976); *Austin v. State*, 146 Ga. App. 236, 246 S.E.2d 143 (1978); *Raven v. State*, 168 Ga. App. 398, 309 S.E.2d 656 (1983); *Slater v. State*, 185 Ga. App. 889, 366 S.E.2d 240 (1988).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 73.

ALR. — Cane as a deadly weapon, 30 ALR 815.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or con-

victed of, crime from acquiring, having, carrying, or using firearms or weapons, 43 ALR4th 788.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 ALR Fed. 347.

42-5-64. Educational programming.

(a) The commissioner shall maintain an educational program within the state prison system to assist inmates in achieving at least a fifth-grade level on standardized reading tests. Inmates who test below the fifth-grade level and who have been sentenced to incarceration for a period of one year or longer shall be required by institutional staff to attend appropriate classes until they attain this level or until they are released from incarceration, whichever event occurs first; provided, however, that inmates who have remained in the educational program for 90 school days may voluntarily withdraw thereafter. The commissioner or his designee shall have the discretion to exclude certain inmates from the provisions of this subsection due to the inability of such inmates to benefit from an educational program for reasons which may include: custody status, particularly of those inmates under a death sentence; mental handicap or physical illness; participation in a boot camp program; or possession of a general education diploma or high school diploma. The State Board of Pardons and Paroles shall incorporate satisfactory participation in such an educational program into the parole guidelines adopted pursuant to Code Section 42-9-40.

(b) For the purposes of this Code section, educational programming shall not apply to inmates who:

- (1) Have been sentenced to death;
- (2) Have attained 50 years of age; or
- (3) Have serious learning disabilities.

(c) The commissioner shall provide additional educational programs in which inmates can voluntarily participate to further their education beyond the fifth-grade level.

(d) The commissioner shall utilize available services and programs within the Department of Education, and the Department of Education shall cooperate with the commissioner in the establishment of educational programs and the testing of inmates as required in this Code section.

(e) The commissioner shall be authorized to promulgate rules and regulations necessary to carry out the provisions of this Code section. (Code 1981, § 42-5-64, enacted by Ga. L. 1986, p. 1596, § 2; Ga. L. 1992, p. 3219, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, “programming” was substituted for “programing” in subsection (b).

Pursuant to Code Section 28-9-5, in 1992, in subsection (a) as amended by Ga. L. 1992, p. 3219, § 1, “Paroles” was substituted for “Parole” in the fourth sentence of subsection (a).

Editor’s notes. — Ga. L. 1992, p. 3219,

§ 2, not codified by the General Assembly, provides: “This Act shall become effective only when funds are specifically appropriated for purposes of this Act in an appropriations Act making specific reference to this Act. This Act shall apply to those inmates sentenced to the Department of Corrections after its effective date.” Funds were appropriated by the General Assembly at the 1993 session.

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 59.

42-5-65. Victim photographs prohibited; exception.

(a) For purposes of this Code section, the term “inmate” means any person confined in a penal institution or confined in another facility under the jurisdiction of or subject to the authority of the board or while under the custody of officials, officers, or employees under the authority of the board.

(b) An inmate who is serving a sentence for a violation of Chapter 5 of Title 16 relating to crimes against the person shall be prohibited from possessing or carrying about his or her person or maintaining in any prison cell or similar area under his or her control any photograph, picture, or similar depiction of any victim of the offense for which he or she is serving where such photograph, picture, or depiction was a part of the criminal investigation, prosecution, or evidence leading to the inmate’s conviction.

(c) An inmate who is serving a sentence for a violation of Chapter 6 of Title 16 relating to sexual offenses shall be prohibited from possessing or carrying about his or her person or maintaining in any prison cell or similar area under his or her control any photograph, picture, or similar depiction of any victim of the offense for which he or she is serving.

(d) A person acting in violation of this Code section shall be guilty of a misdemeanor.

(e) This Code section shall not apply where the photograph or picture is needed for use in any civil or criminal proceeding provided that the inmate receives permission by a court having jurisdiction over the proceeding and only for so long as and in such manner as directed by court order.

(f) Nothing in this Code section shall limit further restrictions or limitations on the possession of contraband or victim photographs by persons confined or under the custody of the board as deemed appropriate by the board. (Code 1981, § 42-5-65, enacted by Ga. L. 2007, p. 169, § 1/SB 34; enacted by Ga. L. 2007, p. 224, § 2/HB 313.)

Code Commission notes. — The enactment of this Code section by Ga. L. 2007, p. 169, § 1, irreconcilably conflicted with and was treated as superseded by Ga. L. 2007, p. 224, § 2. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders not required. — Violation of O.C.G.A. § 42-5-65(d) is not an offense designated as one that requires fingerprinting. 2008 Op. Att'y Gen. No. 2008-1.

ARTICLE 4

GRANTING SPECIAL LEAVES, EMERGENCY LEAVES, AND LIMITED LEAVE PRIVILEGES

42-5-80. Authorization and general procedure for granting special leave.

Whenever recommended by the warden or superintendent of any penal institution in which inmates committed to the custody of the commissioner have been assigned, the commissioner may grant special leave to an inmate to leave the institution in which he is incarcerated for participation in special community or other meritorious programs or activities deemed beneficial to the inmate and not detrimental to the public. The activity must be such as, in the opinion of the warden or superintendent and the commissioner, will contribute to the rehabilitation process of the inmate involved. In order to be considered for this special leave, the inmate shall be eligible solely upon the concurrence of the warden or superintendent and the commissioner that positive attitudinal and growth patterns are being established. Under no condition shall any inmate be permitted to leave the state under this Code section. This Code section shall not apply to convicted sex offenders. (Ga. L. 1971, p. 342, §§ 1, 2; Ga. L. 1972, p. 579, §§ 1, 2; Ga. L. 1975, p. 898, § 1.)

42-5-81. Issuance of special leave; filing.

All special leaves must be issued in writing, must set a determinate period of duration, and must be signed by both the warden or superintendent and by the commissioner; this authority may not be delegated except as provided in Code Section 42-5-84. All such writings must be kept on file in the office of the commissioner. (Ga. L. 1971, p. 342, § 2; Ga. L. 1972, p. 579, § 2.)

42-5-82. Purposes for which special leave may be granted.

A special leave may be granted for the purpose of:

- (1) Attending educational programs;
- (2) Improving job skills;
- (3) Attending trade licensing examinations;
- (4) Being interviewed for employment;
- (5) Participating in drug abuse, delinquency, or crime prevention programs;
- (6) Participating as a volunteer for a nonprofit organization or governmental agency in an activity serving the general public; or
- (7) For any purpose which the department deems beneficial to both the inmate and the public. (Ga. L. 1971, p. 342, § 3; Ga. L. 1972, p. 579, § 3.)

42-5-83. Emergency leaves.

The warden or superintendent of any penal institution in which inmates committed to the custody of the commissioner have been assigned may authorize, without the prior written approval of the commissioner, emergency leave to an inmate when it is confirmed that there exists a serious illness or death in the inmate's immediate family and when notice and confirmation of the illness or death does not reach the warden or superintendent in time to authorize special leave in the manner provided in Code Section 42-5-81. Emergency leave cannot be granted under this Code section to any inmate who has been convicted of a sex offense, who has escaped or attempted to escape within 12 months preceding the emergency, who has not served sufficient time to demonstrate his responsibility and dependability, or who has an assaultive pattern determined to exist either from the nature of the offense for which he has been convicted or from conduct while incarcerated in the penal institution. The warden or superintendent granting the emergency leave must forward immediately a written report of the action to the commissioner. (Ga. L. 1975, p. 898, § 2.)

42-5-84. Delegation of authority to issue limited leave privileges; records.

The commissioner may delegate to any warden or superintendent of any penal institution in which inmates committed to his custody have been assigned the authority to issue limited privileges to leave the confines of the institution, not to exceed 12 hours and not to extend beyond daylight hours, to any inmate for whom the commissioner has extended, under the authority of Code Section 42-5-59, the limits of the inmate's place of confinement. The limited privileges authorized in this Code section may only be granted to accomplish the purposes enumerated in Code Section 42-5-82. The warden or superintendent granting privileges under this Code section must maintain detailed records of passes authorized by this Code section. (Ga. L. 1975, p. 910, § 1.)

42-5-85. Leave privileges of inmates serving murder sentences.

(a) As used in this Code section, the term:

(1) "Aggravating circumstance" means that:

(A) The murder was committed by a person with a prior record of conviction for a capital felony;

(B) The murder was committed while the offender was engaged in the commission of another capital felony, aggravated battery, burglary in any degree, or arson in the first degree;

(C) The offender, by his or her act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(D) The offender committed the murder for himself, herself, or another, for the purpose of receiving money or any other thing of monetary value;

(E) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(F) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(G) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(H) The murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his or her official duties;

(I) The murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(J) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself, herself, or another.

(2) "Murder" means a violation of Code Section 16-5-1.

(b) No special leave, emergency leave, or limited leave privileges shall be granted to any inmate who is serving a murder sentence unless the commissioner has approved in writing a written finding by the department that the murder did not involve any aggravating circumstance.

(c) The department shall make a finding that a murder did not involve an aggravating circumstance only after an independent review of the record of the trial resulting in the conviction or of the facts upon which the conviction was based. (Code 1981, § 42-5-85, enacted by Ga. L. 1983, p. 1806, § 2; Ga. L. 1984, p. 22, § 42; Ga. L. 1996, p. 748, § 22; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11; Ga. L. 2012, p. 899, § 8-15/HB 1176; Ga. L. 2014, p. 444, § 2-11/HB 271.)

The 2012 amendment, effective July 1, 2012, inserted "in any degree" in paragraph (a)(2). See editor's note for applicability.

The 2014 amendment, effective July 1, 2014, substituted the present provisions of subsection (a) for the former provisions, which read: "As used in this Code section only, the term 'aggravating circumstance' means that."; redesignated former paragraphs (a)(1) through (a)(10) as present subparagraphs (a)(1)(A) through (a)(1)(J), respectively; inserted "or her" in subparagraphs (a)(1)(C) and (a)(1)(H); inserted "herself," in subparagraphs (a)(1)(D) and (a)(1)(J); and added paragraph (a)(2).

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be

the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: "The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for

the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general.”

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any

offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

ARTICLE 5

AWARDING EARNED-TIME ALLOWANCES

42-5-100. Termination of board’s power to award earned-time allowances.

The earned-time allowances, which could have been awarded by the board to inmates based upon the performance of the inmate, in effect on December 31, 1983, shall not apply to:

(1) Those persons who commit crimes on or after January 1, 1984, and who are subsequently convicted and sentenced to the custody of the board;

(2) Those persons who have committed a crime prior to January 1, 1984, but who have not been convicted and sentenced as of December 31, 1983, and who are subsequently sentenced to the custody of the board, including those whose sentences have been probated or suspended, on or after January 1, 1984; however, such persons shall receive the full benefit of the earned-time allowances, in effect on December 31, 1983, and shall receive a release or discharge date computed as if they had been sentenced to the custody of the board, prior to December 31, 1983; or

(3) Those persons previously sentenced to the custody of the board, including those whose sentences have been probated or suspended, as of December 31, 1983; however, such persons shall receive the full benefit of the earned-time allowances in effect on December 31, 1983, and shall receive a release or discharge date the same as reflected in the records of such person on December 31, 1983, less any creditable earned time that such person could have earned as a result of forfeited earned time. (Code 1981, § 42-5-100, enacted by Ga. L. 1983, p. 1340, § 2; Ga. L. 1984, p. 22, § 42.)

Cross references. — Earned time allowance for persons sentenced for a misdemeanor of a high and aggravated nature, § 17-10-4.

Editor's notes. — Ga. L. 1983, p. 1340, § 2, repealed former Code Section 42-5-100, pertaining to the enumeration of powers of the board regarding granting of earned-time allowances, and enacted the present Code section. The former Code section was based on Ga. L. 1976, p. 949,

§ 2; Ga. L. 1978, p. 985, §§ 2-4; and Ga. L. 1980, p. 2002, § 1.

Law reviews. — For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Penal Code 1910, § 1221, former Code 1933, §§ 77-320 and 77-320.1, and under Ga. L. 1956, p. 161, as it read prior to revision by Ga. L. 1976, p. 949, § 1 are included in the annotations for this Code section.

When an inmate's good-time is forfeited, the following constitutionally minimum procedures are required: (1) a hearing; (2) written notice of the charges served at least 24 hours in advance of the hearing; and (3) a written report of the hearing setting out the reasons for the action taken and the evidence relied on. The prisoner may be permitted to call witnesses and present evidence consistent with the needs of the institution. There is no constitutional right to confrontation, cross-examination, or counsel. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976) (decided under former Code 1933, § 77-320).

When disciplinary actions are taken against a prisoner, the Constitution requires only that the hearing be held before final disciplinary action is taken and final forfeiture occurs. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976) (decided under former Code 1933, § 77-320).

Section as to punishment for aggravated misdemeanors not repealed. — Ga. L. 1978, p. 985 did not repeal by implication Ga. L. 1970, p. 236 (see now O.C.G.A. § 17-10-4) (relating to punishment for misdemeanors of a high and aggravated nature). *Sutton v. Garmon*, 245 Ga. 685, 266 S.E.2d 497 (1980) (decided under Ga. L. 1978, p. 985).

Jurisdiction of court over good-time allowances. — Sentence of confinement for a period of two years is fully served at the time the executive department releases the prisoner, and any

attempt by a court to impose the court's will over the executive department as to what constitutes service of a period of confinement would be a nullity and constitute an exercise of power granted exclusively to the executive department. *Johns v. State*, 160 Ga. App. 535, 287 S.E.2d 617 (1981) (decided under former Code 1933, § 77-320.1).

Applying federal system service toward state good-time allowances. — Defendant's service under the federal system, during which time the defendant was serving a four-year probated sentence imposed by the state superior court, did not enable the defendant to earn statutory good-time and extra good-time allowances toward the defendant's probated state sentence. *Wellons v. State*, 164 Ga. App. 100, 296 S.E.2d 397 (1982) (decided under former Code 1933, § 77-320).

Trial for offense of escape. — Even though a prisoner is not tried for the statutory offense of escape in the courts, the defendant may be found guilty by the Department of Corrections. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976) (decided under former Code 1933, § 77-320).

Two sentences served concurrently. — When a person was convicted of two felonies, and served the person's sentences concurrently, so that the person was entitled to be released upon termination of the longer sentence, the person could not have such term reduced on account of good conduct by calculating an allowance for good conduct on each of the two sentences, and deducting the aggregate time from the longer sentence. *Chattahoochee Brick Co. v. Goings*, 135 Ga. 529, 69 S.E. 865, 1912A Ann. Cas. 263 (1910) (decided under former Penal Code 1910, § 1221).

When prisoner entitled to extra good-time credit. — One is only entitled

to extra good time if one is a "deserving and exemplary" prisoner, and only then in accordance with the rules and regulations of the Board of Corrections. *Balkcom v. Sellers*, 219 Ga. 662, 135 S.E.2d 414 (1964) (decided under Ga. L. 1956, p. 161).

Granting and taking of good time is an administrative action. — The action is upon sentences then being served and does not relate to the imposition of a sentence after conviction. *Potts v. State*, 134 Ga. App. 512, 215 S.E.2d 276 (1975) (decided under Ga. L. 1956, p. 161).

Judicial authority as to amount of good-time allowance. — Judge has no authority to say what good-time or extra good-time allowance a prisoner shall be given as the law vests that authority in the Board of Corrections for prisoners under its jurisdiction. *Grimes v. Stewart*, 222 Ga. 713, 152 S.E.2d 369 (1966) (decided under Ga. L. 1956, p. 161).

When an inmate's good time is forfeited the following constitutionally minimum procedures are required: (1) a hearing; (2) written notice of the charges served at least 24 hours in advance of the hearing; and (3) a written report of the hearing setting out the reasons for the action taken and the evidence relied on. The prisoner may be permitted to call witnesses and present evidence consistent with the needs of the institution. There is no constitutional right to confrontation, cross-examination, or counsel. *Story v.*

Ault, 238 Ga. 69, 230 S.E.2d 875 (1976) (decided under Ga. L. 1956, p. 161).

When disciplinary actions are taken against a prisoner, the Constitution requires only that the hearing be held before final disciplinary action is taken and final forfeiture occurs. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976) (decided under Ga. L. 1956, p. 161).

Forfeiture of good-time allowance because of escape. — Punishment by forfeiture of good-time allowances for escape is executive punishment and does not prevent prosecution for the same offense in a court of law. *Mincey v. Hopper*, 233 Ga. 378, 211 S.E.2d 283 (1974) (decided under Ga. L. 1956, p. 161).

There is no merit in the contention that an appellant's good-time allowance could not be forfeited because of the appellant's escape without the appellant's trial in a court of law for the crime of escape. *Mincey v. Hopper*, 233 Ga. 378, 211 S.E.2d 283 (1974) (decided under Ga. L. 1956, p. 161).

Probationer is not a prisoner within meaning of section and, therefore, one serving a sentence on probation is not entitled as a matter of law to statutory or extra good-time allowances. *Balkcom v. Gaulding*, 216 Ga. 410, 116 S.E.2d 545 (1960) (decided under Ga. L. 1956, p. 161).

Cited in *Balkcom v. Heptinstall*, 152 Ga. App. 539, 263 S.E.2d 275 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1956, p. 161, as it read prior to revision by Ga. L. 1976, p. 949, §§ 1, 2 are included in the annotations for this Code section.

Fundamental public policy underlying section is orderly administration of penitentiary service of prisoners, which is enhanced by a system of rewards in which the prisoner participates through a reduction of time served; the state also benefits through a lessening of ever constant discipline problems. The state receives no benefit by awarding statutory good time to an individual not "in any prison or county public works camp (now county correc-

tional institution) operated under the jurisdiction of the board." This section was passed to benefit both the state and the prisoner. Since the state is not benefited directly when the prisoner is not under the jurisdiction of the board, the application of the provision dealing with statutory good time would be unauthorized. 1963-65 Op. Att'y Gen. p. 143 (decided under Ga. L. 1956, p. 161).

Effect on powers of State Board of Pardons and Parole. — O.C.G.A. § 42-5-100, which terminates the power of the Board of Offender Rehabilitation (Corrections) to provide for earned-time allowances for inmates under its supervision or custody, has no effect on the pow-

ers of the State Board of Pardons and Paroles to grant earned time to persons serving their sentences on parole or other conditional release, and further has no effect on the board's authority to withhold or to forfeit, in whole or in part, any such earned-time allowances. 1984 Op. Att'y Gen. No. 84-7.

Earned-time credit by one sentenced before December 31, 1983, and paroled on January 31, 1984. — See 1986 Op. Att'y Gen. No. 86-7.

Legislative intent behind this section is to provide for the uniform computation of sentences; therefore, an inmate who is held by a county, pending the appeal of a felony conviction, should benefit from the earned-time provisions in the computation of his release date. 1978 Op. Att'y Gen. No. U78-46 (decided under Ga. L. 1976, p. 949, §§ 1 and 2).

Sheriff responsible for calculating sentences. — As a natural concomitance of the duties imposed under former Code 1933, §§ 77-101, 77-110, 77-111, and Ga. L. 1976, p. 949, § 2 (see now O.C.G.A. §§ 42-4-1, 42-4-4, and 42-5-100), the sheriff would be responsible for calculating sentences of felony prisoners held in the county jail pending appeal, and would be the appropriate discharging authority should a sentence expire before a prisoner was transferred to the custody of state authorities. 1978 Op. Att'y Gen. No. U78-46.

Youthful offender may be classified as habitual offender. — Inmate sentenced under Youthful Offender Act (O.C.G.A. Ch. 7, T. 42) may also be classified as a habitual offender under this section for purposes of sentence computation. Further, in the rare case when a youthful offender is also classified as a habitual offender, earned-time adjustment for habitual offenders should be used in computing the offender's unconditional release date. 1981 Op. Att'y Gen. No. 81-62.

There are two types of "earned time": "parole earned time" granted by the State Board of Pardons and Paroles pursuant to its rules and regulations, and "incarcerated earned time" granted by the Department of Offender Rehabilitation (Corrections) pursuant to its rules and

regulations. 1980 Op. Att'y Gen. No. 80-113.

Awarding of earned time against probated sentence would frustrate intent of sentencing judge who has made a previous judicial determination under §§ 17-10-1 and 42-8-34 that the particular individual should be subject to a specific period of supervision and control while he is being reintegrated into society. 1982 Op. Att'y Gen. No. 82-58.

Felons confined in county jail. — The crediting of earned time to misdemeanants confined to county correctional facilities under former subsection (d), applied in the situation where a felon was sentenced to confinement in a county jail as a condition of probation. 1982 Op. Att'y Gen. No. U82-47.

Prerequisite for computation of good-time allowances and deductions. — With the limited exception of § 42-6-5 relating to temporary custody of convicted inmates in county facilities, good-time allowances and deductions therefrom can only be computed when inmates are under the jurisdiction and control of the institutions operated by the Department of Offender Rehabilitation (Corrections); moreover, with the limited exception of § 42-6-5, neither sheriffs nor the department can take jail credit away from inmates who have misbehaved in jails prior to their being sent to correctional institutions. 1972 Op. Att'y Gen. No. 72-61.

Penal systems not operated by board. — The Board of Offender Rehabilitation (Corrections) has authority to adopt a policy under which the commissioner may designate penal systems other than those operated by the board as places of confinement for service of state sentences when concurrent sentences are imposed; this practice would enable a prisoner to earn all possible good time even though not actually serving his sentence in a state institution. 1963-65 Op. Att'y Gen. p. 240.

Where one has probated sentence to serve upon completion of in-prison time, probated sentence with its accompanying supervision begins upon discharge of inmate from confinement and continues to run through the period of

time originally prescribed for the probated sentence; to allow the inmate to begin his probated sentence when he ordinarily would have been discharged from his in-prison sentence without the good-time allowances, is to allow the inmate to return to society without the benefit and guidance of supervision and without the help the court needs to become aware of violations by the probationer. 1971 Op. Att'y Gen. No. 71-48.

Requests for retention of custody of inmate by county probation department. — Requests from a county probation department for the retention of custody of an inmate pending the arrival of a deputy sheriff or a probation officer must be disregarded by the wardens. 1969 Op. Att'y Gen. No. 69-151.

Prisoners at Central State Hospital. — Board of Corrections has the power to promulgate rules and regulations as to good-time allowances which are applicable to prisoners transferred to Central State Hospital due to mental illness. 1975 Op. Att'y Gen. No. 75-146.

Time spent by felon incarcerated under Department of Human Resources not to be considered when computing good-time allowances; rather, good

time should be computed from the date the felon is received by an institution under the Board of Corrections' jurisdiction. 1975 Op. Att'y Gen. No. 75-78.

Because a sentence begins running from the time of incarceration under the Department of Human Resources, the prisoner must serve one-third of the time to which he has been sentenced, including the time he has spent in the custody of the Department of Human Resources before becoming eligible for parole. 1975 Op. Att'y Gen. No. 75-78.

Effect of prisoner's acquittal in escape trial. — The fact that a prisoner was acquitted in a trial on a charge of escape has no legal effect on the authority of the Board of Offender Rehabilitation (Corrections) to deduct from prisoner's good-time allowance for such an escape. 1967 Op. Att'y Gen. No. 67-234.

Means of computing good-time allowance. — The word "only" in § 17-10-4 should be read as negating any implication that good-time allowances for persons sentenced under that section should be computed in the same manner as for persons convicted of ordinary misdemeanors under this section. 1972 Op. Att'y Gen. No. 72-138.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 204-217.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, §§ 142-151.

ALR. — Withdrawal, forfeiture, modification, or denial of good-time allowance to prisoner, 95 ALR2d 1265.

42-5-101. Work incentive credits.

(a) The Department of Corrections is authorized to devise and to provide by agency rule a system of work incentive credits which may be awarded by the department to persons committed to its custody for any felony prison term other than life imprisonment.

(b) Work incentive credits may be awarded by the department to recognize inmates' institutional attainments in academic or vocational education, satisfactory performance of work assignments made by the penal institution, and compliance with satisfactory behavior standards established by the department.

(c) The department may award up to one day of work incentive credits for each day during which the subject inmate has participated in

approved educational or other counseling programs, has satisfactorily performed work tasks assigned by the penal institution, and has complied with satisfactory behavior standards established by the department.

(d) Any work incentive credits awarded an inmate by the department shall be reported by the department to the State Board of Pardons and Paroles which shall consider such credits when making a final parole release decision regarding the subject inmate. The department is authorized to recommend the board apply the work incentive credits to advance any tentative parole release date already established for the subject inmate.

(e) The department also shall report to the State Board of Pardons and Paroles the cases of inmates who decline or refuse to participate in work, educational, or counseling programs, who fail to comply with satisfactory behavior standards, and who therefore refuse to earn work incentive credits. (Code 1981, § 42-5-101, enacted by Ga. L. 1992, p. 3221, § 3.)

Editor's notes. — Former Code Section 42-5-101, pertaining to the applicability of Code Section 42-5-100 to persons sentenced prior to July 1, 1976, was based on Ga. L. 1956, p. 161, § 24; Ga. L. 1961,

p. 127, § 1; Ga. L. 1964, p. 495, § 1; Ga. L. 1968, p. 1399, § 6; Ga. L. 1976, p. 949, § 1; and Ga. L. 1978, p. 985, § 1, and was repealed by Ga. L. 1983, p. 1340, § 2, effective January 1, 1984.

ARTICLE 6

VOLUNTARY LABOR PROGRAM

Editor's notes. — Ga. L. 2005, p. 1222, § 1/HB 58, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Working Against Recidivism Act.'"

Ga. L. 2005, p. 1222, § 2/HB 58, not codified by the General Assembly, provides that: "The General Assembly finds and declares that:

"(1) Many persons sentenced to confinement for criminal offenses commit additional criminal offenses after release from confinement, and such recidivism is a serious danger to public safety and a major source of expense to the state;

"(2) Under the appropriate conditions and limitations, work programs of voluntary labor by inmates of state and county correctional institutions for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers provide substantial public benefits by:

"(A) Providing job experience and skills to participating inmates;

"(B) Allowing participating inmates to accumulate savings available for their use when released from the correctional institution;

"(C) Lowering recidivism rates;

"(D) Generating taxes from inmate income;

"(E) Reducing the cost of incarceration by enabling participating inmates to pay room and board; and

"(F) Providing participating inmates income to pay fines, restitution, and family support;

"(3) Appropriate conditions and limitations for voluntary labor by inmates for such work programs include but are not limited to:

"(A) Assurance that inmates' work is voluntary;

"(B) Payment of inmates at wages at a rate not less than that paid for work of a

similar nature in the locality in which the work is to be performed;

“(C) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector workers;

“(D) Selection of participating inmates with careful attention to security issues;

“(E) Appropriate supervision of inmates during travel or employment outside the correctional institution;

“(F) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

“(G) Consultations with local private

employers that may be economically impacted; and

“(H) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

“(4) Requirements for the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations are sufficient to ensure appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers.”

42-5-120. Rules and regulations; requirements.

(a) The board is authorized to issue and promulgate rules and regulations for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers. Such rules and regulations shall be designed to meet the published requirements of the Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations and to provide other appropriate conditions and limitations. Such rules and regulations may provide for administration and management of such work programs by the department and the Georgia Correctional Industries Administration.

(b) The rules and regulations for the work programs authorized by this article shall include but not be limited to rules requiring:

(1) Assurance that inmates' work is voluntary and that there shall be no retribution against inmates who do not volunteer;

(2) Payment of inmates at wages at a rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

(3) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector employees;

(4) Selection of participating inmates with careful attention to security issues;

(5) Appropriate supervision of inmates during travel and employment outside the correctional institution;

(6) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

(7) Consultations with local private businesses that may be economically impacted;

(8) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

(9) Procedures for deductions from inmate wages for federal, state, and local taxes; reasonable charges for room and board; court-ordered child support and voluntary family support; and payments to the Georgia Crime Victims Emergency Fund of not less than 5 percent nor greater than 20 percent of gross wages, in compliance with Prison Industry Enhancement Certification Program requirements.

(b.1) Regulations relating to paragraphs (2) and (6) of subsection (b) of this Code section and relating to whether labor shortages exist shall be promulgated and issued jointly by the board and the Commissioner of Labor.

(c) Notwithstanding the provision of Code Section 50-13-2 exempting the Board of Corrections from the definition of the term “agency” and thus from the provisions of Chapter 13 of Title 50, the “Georgia Administrative Procedure Act,” the rules and regulations promulgated in accordance with this Code section shall be subject to the provisions of Code Section 50-13-4, relating to procedural requirements for the adoption, amendment, or repeal of rules; the limitation on an action to contest rules; and legislative override of rules to which the members of the General Assembly object. (Code 1981, § 42-5-120, enacted by Ga. L. 2005, p. 1222, § 4/HB 58; Ga. L. 2007, p. 224, § 3/HB 313.)

Administrative rules and regulations. — Prison Industry Enhancement Certification Program (PIECP) Rules of General Applicability, Official Compila-

tion of the Rules and Regulations of the State of Georgia, Georgia Department of Labor, Employment Services Division, Chapter 300-9-1.

OPINIONS OF THE ATTORNEY GENERAL

Administration of voluntary labor programs. — State law as of 2005 does not permit the Georgia Department of Corrections to delegate to the Georgia Correctional Industries Administration

the administration and management of the voluntary inmate labor program authorized pursuant to the Working Against Recidivism Act. 2005 Op. Att’y Gen. No. 2005-5.

42-5-121. Federal certification.

The commissioner shall seek certification under the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers. After receiving certification, the board shall operate one or more such programs. (Code 1981, § 42-5-121, enacted by Ga. L. 2005, p. 1222, § 4/HB 58.)

42-5-122. Conflicting legislation preempted.

Any program for voluntary labor by inmates created in accordance with this article shall not be subject to the provisions of Code Section 42-5-60 prohibiting hiring out inmates to private persons, corporations, and businesses conducted for profit; prohibiting sale of goods, wares, or merchandise manufactured, produced, or mined by inmates to private persons, firms, associations, and corporations; and limiting the amount of compensation for inmates. (Code 1981, § 42-5-122, enacted by Ga. L. 2005, p. 1222, § 4/HB 58.)

42-5-123. Compensation by employers for administrative and other costs to the state.

(a) The board shall ensure by rules or by contractual provisions that the privately owned profit-making employers compensate the department and the Georgia Correctional Industries Administration for any administrative costs or other costs incurred by the department or the administration for the operation of the program or programs. The board shall ensure by rules or by contractual provisions that the department and the administration are compensated for use of any employees of the department or the administration, use of any space owned by or under the control of the department or the administration, or use of any other resources of the department or the administration in the operation of the program or programs.

(b) Employers that participate in inmate work programs under this article shall be prohibited from providing any thing of value to the Board of Corrections, the Department of Corrections, the Georgia Correctional Industries Administration, or any officer or employee thereof other than the payments authorized by this Code section. The Board of Corrections, the Department of Corrections, the Georgia Correctional Industries Administration, and any officer or employee thereof shall be prohibited from accepting any thing of value, other than the payments authorized by this Code section, from employers that

participate in inmate work programs under this article. As used in this Code section, the term "thing of value" shall have the same meaning as that term is defined in Code Section 16-10-2. (Code 1981, § 42-5-123, enacted by Ga. L. 2005, p. 1222, § 4/HB 58; Ga. L. 2007, p. 224, § 4/HB 313.)

42-5-124. Publicizing and inviting participation in programs; cooperation with the Department of Labor.

Following the issuance and promulgation of rules and regulations, the department and the Georgia Correctional Industries Administration are authorized to publicize the program and invite employers to participate. The department shall rely upon the Georgia Department of Labor for determining whether inmates would be displacing other workers, whether labor shortages exist, and the prevailing local wage for work to be done by inmates. The Georgia Department of Labor is authorized to provide such determinations to the department. (Code 1981, § 42-5-124, enacted by Ga. L. 2005, p. 1222, § 4/HB 58; Ga. L. 2007, p. 224, § 5/HB 313.)

42-5-125. General applicability; exceptions.

(a) Every program involving employment of an inmate, convict, or prisoner by a business operated for profit to manufacture, produce, or mine goods, wares, or merchandise for transportation in interstate commerce or to provide services shall become a part of the programs authorized by this article and shall conform to the rules and regulations promulgated in accordance with this article.

(b) This Code section shall not apply to programs for the production of agricultural commodities, parts for the repair of farm machinery, or goods, wares, or merchandise manufactured for use by not for profit organizations, the federal government, the District of Columbia, or by any state or political subdivision of a state.

(c) This Code section shall not apply to an inmate, convict, or prisoner serving a term of supervised release, as described in 18 U.S.C. Section 3583. (Code 1981, § 42-5-125, enacted by Ga. L. 2005, p. 1222, § 4/HB 58.)

CHAPTER 6

DETAINERS

Article 1

General Provisions

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42-6-6.

Applicability of article to mentally ill persons.

Sec.

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42-6-20.

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Appointment of central administrator and information agent.

42-6-24.

Delivery of inmate mandatory when required by operation of agreement.

42-6-25.

Escape by person in custody under agreement.

JUDICIAL DECISIONS

O.C.G.A. Ch. 6, T. 42 does not require the filing of a detainer, but only states what action is required by an inmate if a detainer is filed. *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

Cited in *Reed v. State*, 249 Ga. 344, 290 S.E.2d 469 (1982).

ARTICLE 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

Strict construction. — Detainer statutes are in derogation of the common law and must be strictly construed. *Street v.*

State, 211 Ga. App. 230, 438 S.E.2d 693 (1993).

OPINIONS OF THE ATTORNEY GENERAL

Ga. L. 1968, p. 1110, § 1 is not an **ex post facto or retroactive law**. 1969 Op. Att'y Gen. No. 69-95.

Primary purpose of Ga. L. 1968, p. 1110, § 1 is to aid the prisoner in rendering the prisoner's future more certain by allowing the prisoner to request the dis-

position of outstanding charges against the prisoner while the prisoner is confined; such a purpose is inconsistent with an authorization to the Board of Offender Rehabilitation (Corrections) to hold the prisoner after the prisoner's sentence has expired. 1969 Op. Att'y Gen. No. 69-410.

Detaining prisoner after expiration of sentence. — It was not contemplated that the board should have the power to

hold a prisoner after the expiration of the prisoner's sentence. 1969 Op. Att'y Gen. No. 69-410.

42-6-1. Definitions.

As used in this article, the term:

- (1) "Commissioner" means the commissioner of corrections.
- (2) "Department" means the Department of Corrections.

(3) "Detainer" means a written instrument executed by the prosecuting officer of a court and filed with the department requesting that the department retain custody of an inmate pending delivery of the inmate to the proper authorities to stand trial upon a pending indictment or accusation, or to await final disposition of all appeals and other motions which are pending on any outstanding sentence, and to which is attached a copy of the indictment, accusation, or conviction which constitutes the basis of the request. The request shall contain a statement that the prosecuting officer desires and intends to bring the inmate to trial upon the pending indictment or accusation, and in the case of an outstanding sentence, that he intends to seek final disposition of all appeals and other motions. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1982, p. 1373, §§ 1, 2; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

JUDICIAL DECISIONS

Due process concerns. — State inmate's 42 U.S.C. § 1983 suit against a county sheriff and state prison warden failed because the inmate's erroneous transfer to prison from the county jail after the inmate was granted an appeal bond in one criminal case did not preclude the inmate from being detained on a bench warrant prior to the trial of a second criminal case; such transfers did not violate the Fourteenth Amendment's due process clause because the inmate did not present any evidence the inmate's detention at the prison was qualitatively different from the inmate's detention in the jail, and pretrial detention in a prison setting was authorized by O.C.G.A. §§ 42-6-1 to 42-6-5. *White v. Thompson*, 299 Fed. Appx. 930 (11th Cir. 2008) (Unpublished).

Matters constituting "detainer." — Defendant's admission in the defendant's

brief that the district attorney filed a letter with the department of corrections stating there was an outstanding warrant for the defendant, and that the state intended to prosecute, substantially complied with the codal definition of a "detainer." *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

Order of court not "detainer." — Order issued by the trial court directing the Department of Offender Rehabilitation to produce the defendant for arraignment and trial on certain dates was not a detainer, and the defendant was not required to follow the procedure outlined in O.C.G.A. § 42-6-3 for ensuring the trial date after the defendant had filed a demand for speedy trial. *Street v. State*, 211 Ga. App. 230, 438 S.E.2d 693 (1993).

OPINIONS OF THE ATTORNEY GENERAL

This section is no more than a definition; it does not command the filing of a detainer nor any response on the part of the board. 1969 Op. Att'y Gen. No. 69-410.

Article not an ex post facto or retroactive law. 1969 Op. Att'y Gen. No. 69-95.

Primary purpose of this article is to aid the prisoner in rendering the prisoner's future more certain by allowing the prisoner to request disposition of outstanding charges against the prisoner while the prisoner is confined; such a purpose is inconsistent with an authorization to the Board of Offender Rehabilitation (Corrections) to hold the prisoner after the prisoner's sentence has expired. 1969 Op. Att'y Gen. No. 69-410.

Applicable to prisoners with appeals pending upon prior convictions. — While Ga. L. 1968, p. 1110, § 1 (see now O.C.G.A. §§ 42-6-1 through 42-6-6) does not specifically mention prisoners with appeals pending upon prior convictions, there is nothing in the statutes which would prohibit either a district attorney or a sheriff from writing the Board of Offender Rehabilitation (Corrections) that such a situation exists with reference to a prisoner, and from sending an arresting officer with a warrant to pick up the prisoner upon release. 1972 Op. Att'y Gen. No. U72-101 (rendered prior to 1982 amendment).

Detention after expiration of sentence. — It was not contemplated that the board should have power to hold a prisoner after expiration of the prisoner's sentence. 1969 Op. Att'y Gen. No. 69-410.

Request for detention from county probation department. — As officers and employees of county probation departments are not prosecuting officers of court, requests of county probation department for detention of an inmate on the inmate's release date cannot be treated as detainers. 1969 Op. Att'y Gen. No. 69-268.

Request for the retention of an inmate supported by warrant only does not constitute filing of a detainer. 1969 Op. Att'y Gen. No. 69-23.

Request for detention and return of inmate in Georgia prison system to county for service of sentence already imposed and to be served in county work camp (now county correctional institution) is not a detainer within the meaning of Ga. L. 1968, p. 1110, § 1 (see now O.C.G.A. §§ 42-6-1 through 42-6-6); the same relates solely to requests for the detention of an inmate pending delivery for trial upon pending charges. 1968 Op. Att'y Gen. No. 68-502.

Recourse in lieu of detainer. — Although the detainer procedure may be invoked by an accusation without a waiver of indictment by grand jury, this procedure will not authorize the Board of Offender Rehabilitation (Corrections) to hold a prisoner after the prisoner's sentence has expired; the district attorney can arrest the prisoner upon the prisoner's release and proceed against the prisoner as the district attorney would proceed against any other criminal defendant. 1969 Op. Att'y Gen. No. 69-410.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 129-131.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 133, 134.

42-6-2. When detainers to be accepted and filed by department.

The department shall accept and file only those detainers which meet the requirements of this article and which are filed in accordance with this article; provided, however, this article shall not apply to detainers filed by the authorities of the United States government or of any of the other several states or of any foreign state. (Ga. L. 1968, p. 1110, § 1.)

JUDICIAL DECISIONS

Authority. — Defendant's motion for bond was properly denied because a purported detainer did not meet the requirements in O.C.G.A. § 42-6-2, did not constitute arrest and confinement of the defendant, did not require the present-

ment of the charges to a grand jury within 90 days, and did not entitle the defendant to automatic bail under O.C.G.A. § 17-7-50. *Denson v. State*, 317 Ga. App. 456, 731 S.E.2d 130 (2012).

42-6-3. Time limit for trial; notice and request for final disposition; notification of inmate and interested parties; effect of escape by inmate.

(a) Whenever a person has entered upon a term of imprisonment in a penal institution under the jurisdiction of the department and whenever during the continuance of the term of imprisonment there is pending in any court in this state any untried indictment or accusation on the basis of which a detainer has been filed against such an inmate, he shall be brought to trial within two terms of court after he has caused to be delivered to the prosecuting officer and the clerk of the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request that a final disposition be made of the indictment or accusation; provided, however, that, for good cause shown in open court, the inmate or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the inmate shall be accompanied by a certificate of the department stating the term of commitment under which the inmate is being held, the computed expiration date of the commitment, and the time of parole eligibility of the inmate.

(b) The written notice and request for final disposition referred to in subsection (a) of this Code section shall be given or sent by the inmate to the commissioner who shall promptly forward it, together with the certificate referred to in subsection (a) of this Code section, to the appropriate prosecuting officer and court by registered or certified mail or statutory overnight delivery.

(c) Within 15 days, the warden, superintendent, or other official having physical custody of the inmate shall inform him of the source and furnish him with a copy of the contents of any detainer filed against him and shall also inform him of his right to make a request for a final disposition of the indictment or accusation upon which the detainer is based.

(d) Any request for final disposition of a pending indictment or accusation made by an inmate pursuant to subsection (a) of this Code section shall operate as a request for final disposition of all untried indictments or accusations on the basis of which detainers have been

filed against the inmate from the county to whose prosecuting official the request for a final disposition is specifically directed. The commissioner shall promptly notify all interested prosecuting officers and courts in the several jurisdictions within the county to which the inmate's request for final disposition is being sent of the proceeding being initiated by the inmate. Notification sent pursuant to this subsection shall be accompanied by copies of the inmate's written notice and request and by the certificate. If trial is not had on any indictment or accusation upon which a detainer has been based within two terms of court after the receipt by the appropriate prosecuting officers and court of the inmate's request for final disposition, provided no continuance has been granted, all detainers based upon such pending indictments or accusations shall be stricken and dismissed from the records of the department.

(e) Escape from custody by an inmate subsequent to his execution of the request for a final disposition of any pending indictment or accusation shall automatically void the request for final disposition and the same shall be stricken and dismissed from the records of the department. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Demand for trial generally, § 17-7-170 et seq.

JUDICIAL DECISIONS

Defendants serving time outside of state. — This section has no application to a defendant who is serving in a penal institution outside of the state and not under the jurisdiction of the Board of Corrections. *Butler v. State*, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

Speedy trial. — When the defendant is not within the purview of subsection (a) of this section, nor does the record show compliance with when §§ 17-7-170, 17-8-21, or 17-8-33, the defendant is not denied the right to a speedy trial within the meaning of Ga. Const. 1983, Art. I, Sec. I, Para. XI or U.S. Const., Art. VI, when the defendant's trial is delayed after the defendant withdraws the defendant's guilty plea. *Butler v. State*, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

Order issued by the trial court divesting the Department of Offender Rehabilitation to produce the defendant for arraignment and trial on certain dates was not a detainer and the defendant was not re-

quired to follow the procedure authorized in O.C.G.A. § 42-6-3 for ensuring the trial date after the defendant had filed a demand for speedy trial. *Street v. State*, 211 Ga. App. 230, 438 S.E.2d 693 (1993).

Trial requirement not actuated by demand for trial. — When the defendant freely admitted to the trial court that the defendant made no demand for a speedy trial or disposition of the defendant's indictment to the appropriate authorities, the requirement that "an inmate ... shall be brought to trial within two terms of court" was never actuated by a demand for trial. *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

Sanction for violating subsection (a). — Only sanction provided for the state's failure to comply with the requirements of subsection (a) of O.C.G.A. § 42-6-3 is that the detainers based upon pending indictments or accusations shall be stricken or dismissed. *Quick v. State*, 198 Ga. App. 353, 401 S.E.2d 758 (1991).

RESEARCH REFERENCES

ALR. — What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

42-6-4. Effect of failure to meet time limit for trial after delivery of inmate pursuant to Code Section 24-13-60.

If an inmate is not brought to trial upon a pending indictment or accusation within two terms of court after delivery of the inmate to the sheriff or a deputy sheriff pursuant to subsection (a) of Code Section 24-13-60, provided no continuance has been granted, all detainers based upon the pending indictments or accusations shall be stricken and dismissed from the records of the department. (Ga. L. 1968, p. 1110, § 1; Ga. L. 2011, p. 99, § 62/HB 24.)

Cross references. — Demand for trial generally, § 17-7-170 et seq.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

42-6-5. Temporary custody of inmate requesting disposition of pending indictment or accusation.

(a) In response to the request of an inmate for final disposition of any pending indictment or accusation made pursuant to Code Section 42-6-3 or pursuant to an order of a court entered pursuant to subsection (a) of Code Section 24-13-60, the department shall offer to deliver temporary custody of the inmate to the sheriff or a deputy sheriff of the county in which the indictment or accusation is pending against the inmate. The judge of the court in which the proceedings are pending is authorized to and shall issue an ex parte order directed to the department requiring the delivery of the inmate to the sheriff or a deputy sheriff of the county in which the trial is to be held.

(b) The sheriff or a deputy sheriff of a county accepting temporary custody of an inmate shall present proper identification and a certified copy of the indictment or accusation upon which trial is to be had.

(c) If the sheriff or deputy sheriff fails or refuses to accept temporary custody of the inmate, detainers based upon indictments or accusations upon which trial has been sought shall be stricken and dismissed from the records of the department.

(d) The temporary custody referred to in this article shall be only for the purpose of permitting prosecution on the pending indictments or

accusations which form the basis of the detainer or detainers filed against the inmate.

(e) At the earliest practicable time consonant with the purposes of this article, the inmate shall be returned by the sheriff or a deputy sheriff to the custody of the department.

(f) During the continuance of temporary custody or while the inmate is otherwise being made available for trial as required by this article, the sentence being served by the inmate shall continue to run and good time shall be earned by the inmate to the same extent that the law allows for any other inmate serving under the jurisdiction of the department.

(g) From the time that the sheriff or a deputy sheriff receives custody of an inmate pursuant to this article and until the inmate is returned to the physical custody of the department, the county to which the inmate is transported shall be responsible for the safekeeping of the inmate and shall pay all costs of transporting, caring for, keeping, and returning the inmate. Any habeas corpus action instituted by the inmate while in the custody of the sheriff shall be defended by the county attorney and the expenses of such litigation shall be paid by the county. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1969, p. 606, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 2011, p. 99, § 63/HB 24.)

Cross references. — Demand for trial generally, § 17-7-170 et seq.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Cited in *Westbrook v. Zant*, 575 F. Supp. 186 (M.D. Ga. 1983).

OPINIONS OF THE ATTORNEY GENERAL

Computation of good-time allowances and deductions. — With the limited exception of this section relating to temporary custody of convicted inmates in county facilities, good-time allowances and deductions therefrom can only be computed when inmates are under the jurisdiction and control of the institutions

operated by the Department of Offender Rehabilitation (Corrections); moreover, with the limited exception of this section, neither sheriffs nor the department can take jail credit away from inmates who have misbehaved in jails prior to their being sent to correctional institutions. 1972 Op. Att'y Gen. No. 72-61.

42-6-6. Applicability of article to mentally ill persons.

This article shall not apply to any person who has been adjudged to be mentally ill. (Ga. L. 1968, p. 1110, § 1.)

Cross references. — Examination, treatment, hospitalization of mentally ill persons generally, T. 37, C. 3.

ARTICLE 2**INTERSTATE AGREEMENT ON DETAINERS****JUDICIAL DECISIONS**

Congressional intent. — Congress has provided in Ga. L. 1972, p. 932 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) an efficient and effective method for resolving a prisoner's claim that the prisoner has been denied a speedy trial and is, therefore, subject to an illegal detainer. Requiring resort to remedies under Ga. L. 1972, p. 932 will remove the necessity of intervention by the federal courts, furthering the established principle of comity between state and federal courts. *Hurst v. Hogan*, 435 F. Supp. 125 (N.D. Ga. 1977).

Right to a speedy trial. — Ga. L. 1972, p. 932 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) is designed to provide the right to a speedy trial for defendants who are not subject to the judicial power of the state having an untried indictment. The agreement has provisions for sanctions if a speedy disposition of the pending indictment is not effected. If trial is not held within 120 days of the arrival of the movant within the jurisdiction of the court in which the indictment is pending and before the movant is returned to the jurisdiction of the sending state, the untried indictment shall be dismissed with prejudice. *Hunt v. State*, 147 Ga. App. 787, 250 S.E.2d 517 (1978).

When the defendant applied for a speedy trial under the provisions of former Code 1933, § 27-1901 (see now O.C.G.A. § 17-7-170) and could not procedurally seek a speedy trial under that section because the defendant was not physically present or within the subpoena power of the Georgia courts, the defendant's right to a speedy trial must be

determined under Ga. L. 1972, p. 932 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) if it was utilized to secure the defendant's trial. *Johnson v. State*, 154 Ga. App. 512, 268 S.E.2d 782 (1980).

Purpose of Ga. L. 1972, p. 932 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) is to ensure speedy trial on pending charges before staleness and difficulty of proof set it. These are pretrial, and not sentencing, considerations. *Suggs v. Hopper*, 234 Ga. 242, 215 S.E.2d 246 (1975); *Bernyk v. State*, 182 Ga. App. 329, 355 S.E.2d 753 (1987).

Invocation of article by nonpresent defendant. — In order for a demand for trial pursuant to the provisions of O.C.G.A. § 17-7-170 to serve as the predicate for an absolute acquittal because of the failure of compliance therewith, it is necessary that the filing comply with the provisions of that statute, but a defendant who is not able to satisfy § 17-7-170 and thus not available to pursue the defendant's remedy in the appropriate state court is still not without remedy, since the defendant can invoke the provisions of O.C.G.A. Art. 2, Ch. 6, T. 42. *Luke v. State*, 180 Ga. App. 378, 349 S.E.2d 391 (1986), overruled on other grounds, *State v. Collins*, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

Prerequisite to seeking habeas corpus. — When a prisoner in federal custody seeks to challenge a detainer lodged against the prisoner by officials of a state other than that in which the prisoner is incarcerated, the prisoner must exhaust the prisoner's remedies under Ga. L. 1972,

p. 932 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) before seeking federal habeas corpus. *Hurst v. Hogan*, 435 F. Supp. 125 (N.D. Ga. 1977).

Comity between states. — State need not reduce a capital sentence authorized under its own laws because of the effects

of another state's judicial processes, brought about by operation of Ga. L. 1972, p. 932 (see now O.C.G.A. Art. 2, Ch. 6, T. 42). *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

Cited in *Sassoon v. Stynchombe*, 654 F.2d 371 (5th Cir. 1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 131.

ALR. — Validity, construction, and ap-

plication of interstate agreement on detainees, 98 ALR3d 160.

42-6-20. Enactment and text of agreement.

The Agreement on Detainers is enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

ARTICLE I.

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainees based on untried indictments, information or complaints. The party states also find that proceedings with reference to such charges and detainees, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II.

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III.

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by the certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail or statutory overnight delivery, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent

of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV.

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already

served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V.

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given;

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement

providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI.

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII.

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII.

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX.

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the Constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining

states and in full force and effect as to the state affected as to all severable matters. (Ga. L. 1972, p. 938, § 1; Ga. L. 2000, p. 1589, § 3.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSTITUTIONALITY

INITIATING DETAINING PROCEEDINGS

1. ARTICLE III
2. ARTICLE IV
3. ARTICLE V

General Consideration

Applicability. — Ga. L. 1972, p. 938 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) by its terms relates only to an untried indictment, information, or complaint and does not apply to warrants for arrest for probation violation. *Suggs v. Hopper*, 234 Ga. 242, 215 S.E.2d 246 (1975).

Ga. L. 1972, p. 938 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) does not address itself to transfers from the receiving jurisdiction back to the sending jurisdiction either after trial or after sentencing. *State v. Sassoon*, 240 Ga. 745, 242 S.E.2d 121 (1978).

Detainer based on an arrest warrant for pending criminal charges does not trigger the protections of the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20. *State v. Carlton*, 276 Ga. 693, 583 S.E.2d 1 (2003).

Speedy trial provisions. — It is clear from the language of the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, that its speedy trial provisions apply exclusively to untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

Effect of failure to comply with article. — Since the appellant failed to comply with the requirements of Ga. L. 1972, p. 938 (see now O.C.G.A. Art. 2, Ch. 6, T. 42) the noncompliance renders the defendant's request for trial invalid. *Greathouse v. State*, 156 Ga. App. 491, 274 S.E.2d 835 (1980).

When an escapee from a Florida prison committed crimes in Georgia, before being

caught and returned to Florida, and was indicted in Georgia but did not comply with the procedures under O.C.G.A. § 42-6-20 to trigger the 180-day rule, the defendant was not denied a speedy trial. *Cothern v. State*, 195 Ga. App. 513, 393 S.E.2d 763 (1990).

State violated the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, by continuing to hold a defendant in Georgia following the dismissal of the terroristic threats charge specified in the detainer, but the defendant was not prejudiced by the error as the defendant could have been tried in Georgia after serving the federal sentence. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

Trial court did not err in dismissing a Columbia County indictment against the defendant, pursuant to O.C.G.A. § 42-6-20, as the state failed to bring the defendant to trial upon a return from imprisonment in South Carolina to face charges in Lincoln County; moreover, the defendant's request for disposition of all untried indictments applied equally to Columbia County as it did to Lincoln County. *State v. Thompson*, 284 Ga. App. 744, 644 S.E.2d 889 (2007).

Failure to comply excusable. — When the state showed that the reason for the delay in trying the defendant was due to, inter alia, conflicts of previously appointed defense counsel and requests for continuance from defense counsel, the trial court did not err in denying the defendant's plea in bar for failure to try the defendant within 180 days pursuant to the Interstate Detainer Act, O.C.G.A. § 42-6-20, et seq. *King v. State*, 268 Ga.

App. 811, 603 S.E.2d 88 (2004).

Failure to comply with procedural requirements. — Trial court properly denied the defendant's motion to dismiss the indictment with prejudice because the defendant never waived extradition for trial on the indictment or requested a final disposition of the detainer based thereon. Therefore, the defendant did not comply with the procedural requirements of the Georgia Interstate Agreement on Detainers (IAD), O.C.G.A. § 42-6-20 et seq., the 180-day deadline was never triggered, and there was no violation of the IAD. *Herbert v. State*, 288 Ga. 843, 708 S.E.2d 260 (2011).

Jurisdiction. — Despite the fact that drug and firearm charges filed against a detainee were not listed in the detainer, the convictions were upheld on appeal as the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20 et seq., neither granted nor divested a trial court's jurisdiction; while the better practice would have been for the state to include all charges for which the detainee was prosecuted within the detainer, it did not sacrifice jurisdiction by failing to do so. *Morrison v. State*, 280 Ga. 222, 626 S.E.2d 500 (2006).

Cited in *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979); *Johnson v. State*, 154 Ga. App. 512, 268 S.E.2d 782 (1980); *Sassoon v. Stynchombe*, 654 F.2d 371 (5th Cir. 1981); *Reed v. State*, 249 Ga. 344, 290 S.E.2d 469 (1982); *Inman v. State*, 191 Ga. App. 497, 382 S.E.2d 122 (1989); *Ricks v. State*, 204 Ga. App. 441, 419 S.E.2d 517 (1992); *Herndon v. State*, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

Constitutionality

Constitutionality of lodging detainer. — Lodging of a detainer by the proper officials of this state against a person serving a term of imprisonment in the correctional institution of a sister state does not violate the provisions of U.S. Const., amends. 6, 8 and 14 or Ga. Const. 1945, Art. I, Sec. I, Para. V (see now Ga. Const. 1983, Art. I, Sec. I, Para. XI). *Pollard v. State*, 128 Ga. App. 470, 197 S.E.2d 158 (1973).

Initiating Detaining Proceedings

1. Article III

One hundred eighty-day provision not inflexible. — This agreement does not contemplate that the 180-day provision is inflexible. *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979).

Holding that the state may ignore a prisoner's request until shortly before the expiration of the 180-day period provided in Article III, and then extend that period by initiating proceedings under Article IV, would effectively nullify the purpose of the 180-day provision of Article III and deny to a prisoner the right to a speedy trial. *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979).

Delay in bringing defendant to trial. — When any delay in bringing the defendant to trial within the time prescribed by Art. III(a) was precipitated by the defendant's agreement to a joint recommendation, the defendant cannot complain that the defendant was not brought to trial in a timely manner. *Smith v. State*, 202 Ga. App. 362, 414 S.E.2d 504 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 504 (1992).

Failure to begin trial within time limit. — Article III does not say that the untried indictment shall be dismissed if the prisoner is not brought to trial within 180 days after the prisoner has served the prisoner's request for final disposition upon the proper Georgia authorities. *Price v. State*, 237 Ga. 352, 227 S.E.2d 368 (1976).

Strict compliance with notice provisions required. — Facsimile transmission of the defendant's request for final disposition was insufficient as a matter of law since it was required to be sent by registered or certified mail. *Clater v. State*, 266 Ga. 511, 467 S.E.2d 537 (1996).

Defendant's direct notice of disposition. — Since the defendant sent the defendant's request for a disposition of the charges directly to the state without a warden's certificate of an inmate's status, rather than through prison authorities, and the required certificate was eventually supplied at a later date, the 180-day period provided in Article III began to run once the state received the certificate

Initiating Detaining Proceedings (Cont'd)

1. Article III (Cont'd)

rather than when the state received the defendant's direct request. *Thompson v. State*, 186 Ga. App. 379, 367 S.E.2d 247, cert. denied, 186 Ga. App. 919, 367 S.E.2d 247 (1988).

When guilt not questioned, no relief for violation. — Violation of the speedy trial provision (Article III(a)) will support no post-conviction relief pursuant to 28 U.S.C. § 2254 when the petitioner alleges no facts casting substantial doubt on the state trial's reliability on the question of guilt. *Seymore v. Alabama*, 846 F.2d 1355 (11th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S. Ct. 816, 102 L. Ed. 2d 806 (1989).

Foreign jurisdiction's delay not dispositive. — When the defendant was tried within 180 days after the requisite documents were filed with all entities required by O.C.G.A. § 42-6-20 and when the initial failure to forward the detainer demand to the proper court was the result of a mistake by out-of-state authorities, there was no violation of § 42-6-20. *Parrott v. State*, 206 Ga. App. 829, 427 S.E.2d 276 (1993).

Dismissal of charges improper. — Because the 180-day period in the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, Art. III(a), during which the defendant was required to be brought to trial, had not expired when the trial court entered the court's dismissal order, and because there was no basis for finding waiver, the trial court erred in dismissing the charges against the defendant with prejudice. *State v. McCarter*, 314 Ga. App. 542, 724 S.E.2d 843 (2012).

2. Article IV

Grace period inapplicable when U.S. government a sending state. — The 30-day rule in paragraph (a) of Article IV which provides for a period of 30 days after a request for temporary custody or availability before such request be honored, would appear to be inapplicable when the United States government is the sending state. *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978), overruled on

other grounds, *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984).

Tacking time limits of Articles III and IV not permitted. — The 120-day provisions of Article IV may not be added to the 180-day provisions of Article III, once a proper request under Article III has been made by the prisoner. *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979).

Tolling time limit. — Court was authorized to find that the 120-day time limit was tolled by delay occasioned by the appellant's numerous pretrial motions in the face of the state's good-faith efforts to expedite the trial. *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

Missing 120-day limit by one week. — Defendant could not complain that the state missed by one week beginning the defendant's trial within 120 days of the defendant's return to Georgia, when a trial date had been set with the agreement of the defendant's attorney, the defendant was returned to Georgia earlier than anticipated and then filed over 60 motions which necessarily had to be determined before trial, and the defendant did not raise any objections to the date set for trial until one day after the 120-day period had elapsed. *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991), rev'd on other grounds sub nom. *Zant v. Moon*, 264 Ga. 93, 440 S.E.2d 657 (1994).

Right to pretransfer hearing. — Prisoner incarcerated in a jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to the procedural protections of that Act, particularly the right to a pretransfer hearing before being transferred to another jurisdiction, pursuant to Art. IV of the Detainer Agreement. *Lambert v. Jones*, 250 Ga. 603, 299 S.E.2d 716 (1983).

Extent of proper inquiries. — Proper inquiries at pretransfer hearings are limited to whether the extradition documents on their face are in order; whether the petitioner has been charged with a crime in the demanding state; whether the petitioner is the person named in the request for extradition; and whether the petitioner is a fugitive. *Lambert v. Jones*, 250

Ga. 603, 299 S.E.2d 716 (1983).

3. Article V

Effect of issuance of habeas corpus writ. — Once a detainer has been lodged against a prisoner and the prisoner has been removed from the prisoner's original place of imprisonment to the receiving state, the issuance of a writ of habeas corpus ad prosequendum to compel the prisoner's presence at trial is a request for

temporary custody within the meaning of this section. *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978), overruled on other grounds, *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984).

Denial of speedy trial. — In a habeas corpus hearing to avoid extradition, the question whether a petitioner was denied a speedy trial by the demanding state is not an appropriate one for adjudication by the asylum state. *Gilstrap v. Wilder*, 233 Ga. 968, 213 S.E.2d 895 (1975).

RESEARCH REFERENCES

ALR. — Construction and application of Article IV of Interstate Agreement on Detainers (IAD): issues related to "speedy trial" requirement, and construction of essential terms, 51 ALR6th 1.

Construction and application of Article IV of Interstate Agreement on Detainers (IAD): issues related to "anti-shuttling" provision, dismissal of action against detainee, and adequacy of certificate, 52 ALR6th 1.

Construction and application of Article IV of Interstate Agreement on Detainers (IAD): issues related to custody, temporary custody, contest as to legality of custody, necessity of hearing, and transmittal orders, 53 ALR6th 1.

Construction and application of article III of Interstate Agreement on Detainers (IAD) — Issues related to "speedy trial" requirement, and construction of essential terms, 70 ALR6th 361.

Construction and application of article III of Interstate Agreement on Detainers (IAD) — Issues related to certificate, request by defendant for disposition, and "anti-shuttling" provision, 71 ALR6th 335.

Construction and application of article III of Interstate Agreement on Detainers (IAD) — Issues related to custody, duties of prison officials, waiver of extradition, escape, assistance of counsel, and necessity of hearing, 72 ALR6th 141.

42-6-21. Meaning of phrase "appropriate court."

The phrase "appropriate court," as used in the Agreement on Detainers with reference to the courts of this state, means the superior courts of this state. (Ga. L. 1972, p. 938, § 2.)

42-6-22. Enforcement of agreement; cooperation with other states.

All courts, departments, agencies, officers, and employees of this state and its political subdivisions are directed to enforce the Agreement on Detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. (Ga. L. 1972, p. 938, § 3.)

42-6-23. Appointment of central administrator and information agent.

The commissioner of corrections shall appoint a person to serve as central administrator of and information agent for the Agreement on Detainers pursuant to Article VII of the agreement. (Ga. L. 1972, p. 938, § 6; Ga. L. 1979, p. 652, § 1; Ga. L. 1985, p. 283, § 1.)

42-6-24. Delivery of inmate mandatory when required by operation of agreement.

It shall be lawful and mandatory upon the warden, superintendent, or other official in charge of a penal institution in this state to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers. (Ga. L. 1972, p. 938, § 5; Ga. L. 1974, p. 390, § 1.)

42-6-25. Escape by person in custody under agreement.

(a) It shall be unlawful for any person to escape from custody while in another state pursuant to the Agreement on Detainers.

(b) A violation of subsection (a) of this Code section shall be punishable by confinement for not less than one nor more than five years. (Ga. L. 1972, p. 938, § 4.)

RESEARCH REFERENCES

ALR. — What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

What constitutes "custody" under 18 USC § 751(a) defining offense of escape from custody, 114 ALR Fed. 581.

CHAPTER 7

TREATMENT OF YOUTHFUL OFFENDERS

Sec.		Sec.	
42-7-1.	Short title.	42-7-6.	Notification of State Board of Pardons and Paroles.
42-7-2.	Definitions.	42-7-7.	Adoption of policies and procedures.
42-7-3.	Providing institutions and facilities.	42-7-8.	Court recommendation of treatment as youthful offender.
42-7-4.	Studies and diagnoses; placement of youthful offender by department.	42-7-9.	Construction of chapter.
42-7-5.	Transfer.		

Cross references. — Judicial proceedings involving juveniles, T. 15, C. 11. Disposition of dependent child, as that term is defined, § 15-11-212. Powers and duties of Department of Human Resources regarding children and youth services, § 49-5-1 et seq.

Editor's notes. — Ga. L. 1985, p. 420, effective March 27, 1985, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter, which also dealt with treatment of youthful offenders, consisted of Code Sections 42-7-1 through 42-7-16. The former chapter also created the Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) and described that former division's powers and duties. While several provisions of Code sections of the former chapter were carried forward into the new chapter (see historical citations in this chapter), the following Acts formed the basis of Code sections which were not carried forward: Ga. L. 1972, p. 592, §§ 3, 4, 5, 6, 7, 13, 14; Ga. L. 1975, p. 900, §§ 2, 7; Ga. L. 1978, p. 922, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.

Ga. L. 1985, p. 420, § 2, not codified by the General Assembly, provided that that Act would not operate to deny any rights to any youthful offender currently on probation pursuant to the "Georgia Youthful Offender Act of 1972," but any such person would remain on probation subject to any conditions as previously specified.

Ga. L. 1998, p. 270, § 13, not codified by the General Assembly, provides: "The General Assembly recognizes that criminal street gangs have succeeded at times in maintaining their structure, organization, and discipline in penal institutions and have continued to conduct criminal activities while incarcerated. Therefore, the General Assembly requests and encourages state and local officials with responsibility for the operation of adult and juvenile penal institutions and related facilities to develop policies and procedures which will identify members of criminal street gangs and, where necessary, to separate members and associates of the same criminal street gang in order that such gang members cannot maintain the gang's structure, organization, and discipline and will have a more difficult time in conducting criminal activities while incarcerated in this state."

JUDICIAL DECISIONS

Effect of previous conviction under this chapter. — O.C.G.A. Ch. 7, T. 42 contains significantly different provisions than the First Offender Act (O.C.G.A.

§ 42-8-60 et seq.); specifically, the chapter does not authorize the discharge of a felony conviction and such conviction under the chapter may serve as a predicate for

sentencing under O.C.G.A. § 17-10-7.
Lazenby v. State, 221 Ga. App. 148, 470
S.E.2d 526 (1996).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the opinions for this chapter. See the Editor's notes under the Chapter 7 heading.

Classification as habitual offender for sentencing purposes. — Inmate sentenced under Ga. L. 1972, p. 592, § 1 (see now O.C.G.A. ch. 7, T. 42) may also be classified as a habitual offender under Ga. L. 1980, p. 2002, § 1 for purposes of sentence computation. Further, in the rare case where a youthful offender is also classified as a habitual offender, earned-time adjustment for habitual offenders should be used in computing the offender's unconditional release date. 1981 Op. Att'y Gen. No. 81-62.

Effect of revocation of offender's conditional release. — When a youthful offender's conditional release is revoked, and the youth is not returned to the youthful offender program, the youth's status as a youthful offender is terminated and the youth's sentence should be computed on the basis of six years or the maximum term for the offense, if less than six years. 1975 Op. Att'y Gen. No. 75-127.

When a combination of youthful offender and standard sentences occur, the Youthful Offender Division may not approve a conditional or unconditional release for the described youthful offender until the youth's concurrent standard sentence had expired; nevertheless, the youth could be assigned to an institution maintained primarily for youthful offenders during the entire period for which the board was charged with custody over the youth, since Ga. L. 1956, p. 161 (see now O.C.G.A. §§ 42-5-50(b) and 42-5-51(b), (d)) empowered the board to assign inmates to any institution within its system, and further other statutory provisions authorized the director (now commissioner) of corrections to segregate youthful offenders from other prisoners. 1973 Op. Att'y Gen. No. 73-82.

Notion of a judicially imposed minimum term of confinement does not comport with the statutory scheme of Ga. L. 1972, p. 592, § 1 (see now O.C.G.A. Ch. 7, T. 42). 1973 Op. Att'y Gen. No. 73-36.

Earning good-time credit. — Youthful offenders can earn good-time credit toward the reduction of the youth's period of confinement to the extent provided in Ga. L. 1972, p. 592, § 1 (see now O.C.G.A. Ch. 7, T. 42). 1975 Op. Att'y Gen. No. 75-50.

RESEARCH REFERENCES

ALR. — Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219.

42-7-1. Short title.

This chapter shall be known and may be cited as the "Georgia Youthful Offender Act of 1972." (Ga. L. 1972, p. 592, § 1; Ga. L. 1985, p. 420, § 1.)

JUDICIAL DECISIONS

Applicability. — Georgia Youthful Offender Act of 1972, O.C.G.A. § 42-7-1 et seq., impacted a sentence and not a conviction. *Smith v. State*, 266 Ga. App. 111, 596 S.E.2d 230 (2004).

Cited in *Carrindine v. Ricketts*, 236 Ga.

283, 223 S.E.2d 627 (1976); *Crowley v. State*, 141 Ga. App. 867, 234 S.E.2d 700 (1977); *Wilson v. State*, 148 Ga. App. 368, 251 S.E.2d 387 (1978); *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

RESEARCH REFERENCES

ALR. — Treatment under Federal Juvenile Delinquency Act (18 USCS §§ 5031-5042) of juvenile alleged to have

violated law of United States, 137 ALR Fed 481.

42-7-2. Definitions.

As used in this chapter, the term:

- (1) “Board” means the Board of Corrections.
- (2) “Commissioner” means the commissioner of corrections.
- (3) “Conviction” means a judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere in a felony case but excludes all judgments upon criminal offenses for which the maximum punishment provided by law is death or life imprisonment.
- (4) “Court” means any court of competent jurisdiction other than a juvenile court.
- (5) “Department” means the Department of Corrections.
- (6) “Treatment” means corrective and preventative incarceration, guidance, and training designed to protect the public by correcting the antisocial tendencies of youthful offenders, which may include but is not limited to vocational, educational, and other training deemed fit and necessary by the department.
- (7) “Youthful offender” means any male offender who is at least 17 but less than 25 years of age at the time of conviction and who in the opinion of the department has the potential and desire for rehabilitation. (Ga. L. 1972, p. 592, § 2; Ga. L. 1973, p. 581, § 1; Ga. L. 1975, p. 900, § 1; Ga. L. 1985, p. 420, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, following the passage of Ga. L. 1985, p. 420, “Cor-

rections” was substituted for “Offender Rehabilitation” and “corrections” was substituted for “offender rehabilitation”.

JUDICIAL DECISIONS

“Youthful offender.” — Defendant previously convicted of burglaries commit-

ted when the defendant was 16 years of age could not have been prosecuted under

the Georgia Youthful Offender Act of 1972 (Act), O.C.G.A. § 42-7-1 et seq., because that Act applied to offenders who were at least 17 years of age. *Smith v. State*, 266 Ga. App. 111, 596 S.E.2d 230 (2004).

Cited in *White v. State*, 137 Ga. App. 9, 223 S.E.2d 24 (1975); *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976); *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

42-7-3. Providing institutions and facilities.

(a) Youthful offenders shall undergo treatment in secure institutions, including training schools, hospitals, farms, and forestry and other camps and including vocational training facilities and other institutions and agencies that will provide the essential varieties of treatment.

(b) The commissioner may, to the extent necessary, set aside such facilities described in subsection (a) of this Code section as are necessary to carry out the purposes of this chapter.

(c) To the extent possible, such institutions and facilities shall be used only for treatment of youthful offenders who have the potential and desire for rehabilitation as provided in this chapter. (Code 1981, § 42-7-3, enacted by Ga. L. 1985, p. 420, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the opinions for this Code section. See the Editor's notes under the Chapter 7 heading.

Youths transferred from the Department of Human Resources enjoy a youthful offender status; a parole eligibility date should be established for them, computed on the basis of a six-year determinate sentence, or the maximum potential term for the offense for which the offender was committed, whichever is less. 1975 Op. Att'y Gen. No. 75-50 (decided under former law).

When a combination of youthful of-

fender and standard sentences occur, the Youthful Offender Division may not approve a conditional or unconditional release for the described youthful offender until the youth's concurrent standard sentence has expired; nevertheless, the youth could be assigned to an institution maintained primarily for youthful offenders during the entire period for which the board is charged with custody over the youth, since former Code 1933, § 77-308(b) (see now O.C.G.A. §§ 42-5-50(b), 42-5-51(b), (d)) empowered the board to assign inmates to any institution within its system, and subsection (c) of this section authorizes the director (now commissioner) of corrections to segregate youthful offenders from other prisoners. 1973 Op. Att'y Gen. No. 73-82 (decided under former law).

RESEARCH REFERENCES

ALR. — Treatment under Federal Juvenile Delinquency Act (18 USCS §§ 5031-5042) of juvenile alleged to have violated law of United States, 137 ALR Fed 481.

42-7-4. Studies and diagnoses; placement of youthful offender by department.

(a) The commissioner shall cause to be made a complete study and diagnosis of each youthful offender, including a physical examination and, where possible and indicated, a mental examination. In the absence of exceptional circumstances, each study and diagnosis shall be completed within a period of 60 days from the date of commitment.

(b) Upon the receipt of all reports and recommendations required by subsection (a) of this Code section, the department shall:

(1) Allocate and direct a transfer of the youthful offender to an institution or facility for treatment; or

(2) Order the youthful offender confined and afforded treatment under such conditions as are necessary for the protection of the public. (Code 1981, § 42-7-4, enacted by Ga. L. 1985, p. 420, § 1.)

JUDICIAL DECISIONS

Cited in *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the annotations for this Code section. See the editor's notes under the Chapter 7 heading.

Receipt of report prerequisite to

grant of conditional release. — As soon as the Youthful Offender Division receives the report and recommendation of the director (now commissioner) of corrections described in this section, the division, subject to final approval by the director (now commissioner), has the discretion to grant a conditional release to the youthful offender who is the subject of the report. 1973 Op. Att'y Gen. No. 73-36 (decided under former law).

RESEARCH REFERENCES

ALR. — Treatment under Federal Juvenile Delinquency Act (18 USCS §§ 5031-5042) of juvenile alleged to have violated law of United States, 137 ALR Fed 481.

42-7-5. Transfer.

The commissioner may order the transfer of the offender from one institution or facility to any other institution or facility operated by the department. (Code 1981, § 42-7-5, enacted by Ga. L. 1985, p. 420, § 1.)

42-7-6. Notification of State Board of Pardons and Paroles.

After receipt of the reports and recommendations provided for by subsection (a) of Code Section 42-7-4 and the commissioner or his designee has determined whether or not an individual shall receive youthful offender treatment, the State Board of Pardons and Paroles shall be notified. (Code 1981, § 42-7-6, enacted by Ga. L. 1985, p. 420, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the annotations for this Code section. See the Editor's notes under the Chapter 7 heading.

Limiting duration of sentence. — Sentencing court does not have the authority to limit the duration of the sentence to less than six years, and a sentence for an indefinite period not to exceed three years is therefore void. *DeFrancis v. Thompson*, 239 Ga. 785, 239 S.E.2d 14 (1977) (decided under former law).

Cited in *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the annotations for this Code section. See the Editor's notes under the Chapter 7 heading.

Receipt of report prerequisite to grant of conditional release. — As soon as the Youthful Offender Division receives the report and recommendation of the director (now commissioner) of corrections, the division, subject to final approval by the director (now commissioner), has the discretion to grant a conditional release to the youthful offender who is the subject of the report. 1973 Op. Att'y Gen. No. 73-36 (decided under former law).

Sentence which purports to order a minimum term of custody has no binding effect on the Youthful Offender Division; while the division should regard such language as an authoritative recommendation that it postpone the conditional release of a particular youthful offender, the division may deal with that offender in accordance with its normal procedures. 1973 Op. Att'y Gen. No. 73-36 (decided under former law).

Complete discretion in granting a conditional or unconditional release was given to the administrators of this former chapter within the time limits specified by the former chapter. Language in a sentence which would either delay release for a stated period or order it to be granted within a shorter period than that described in Ga. L. 1972, p. 592 would not be binding on the Youthful Offender Division, but would only have the effect of a

recommendation; thus, an individual sentenced to serve one year under the former chapter could lawfully remain in the physical custody of the division for a period greater or less than one year. 1973 Op. Att'y Gen. No. U73-60 (decided under former law).

When sentence was expressly imposed under the former chapter so that the person was sentenced to be confined in the Youthful Offender Division, language which specified that the period of custody was not to exceed a period of two years did

not operate to limit the division's discretion over conditional and unconditional release. 1974 Op. Att'y Gen. No. 74-100 (decided under former law).

Any restrictive language in a youthful offender's sentence should be regarded as a compelling recommendation that the release of the particular offender be approved within the time period specified in the youth's sentence. 1974 Op. Att'y Gen. No. 74-100 (decided under former law).

42-7-7. Adoption of policies and procedures.

The State Board of Pardons and Paroles shall adopt policies and procedures concerning individuals designated to receive youthful offender treatment. (Code 1981, § 42-7-7, enacted by Ga. L. 1985, p. 420, § 1.)

42-7-8. Court recommendation of treatment as youthful offender.

If a court finds that a youthful offender might benefit from this chapter, the court may recommend that a young offender be treated as a youthful offender by indicating the recommendation in writing in the sentence itself. When the judge has recommended in the sentence that a person be given youthful offender treatment, release may be made without regard to limitations placed upon the service of a portion of the prison sentence provided by Code Section 42-9-45. After the offender is evaluated, the department will make the decision concerning the placement of the offender. (Code 1981, § 42-7-8, enacted by Ga. L. 1985, p. 420, § 1.)

Cross references. — Sentence and punishment generally, T. 17, C. 10. Punishment of misdemeanor first offenders, § 17-10-3.

Law reviews. — For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the annotations

for this Code section. See the editor's notes under the Chapter 7 heading.

Failure to sentence youth. — Testimony that the appellant had been drinking, cursing, wagering, and carrying an offensive weapon is sufficient evidence to show that the trial court did not abuse the court's discretion when the court failed to

sentence the appellant under the Youthful Offender Act. *Beasley v. State*, 161 Ga. App. 737, 288 S.E.2d 759 (1982) (decided under former law).

Limiting duration of sentence. — Sentencing court did not have authority to limit duration of sentence under the former chapter to less than six years and sentence for indefinite period not to exceed three years was therefore void. *DeFrancis v. Thompson*, 239 Ga. 785, 239 S.E.2d 14 (1977) (decided under former law).

Finding of benefit to defendant. — It was not necessary for the trial court to make a specific affirmative finding before sentencing that a defendant would receive "no benefit" the former chapter. *Woods v. State*, 233 Ga. 347, 211 S.E.2d 300 (1974),

appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2623, 45 L. Ed. 2d 667 (1975) (decided under former law).

Termination of custody by Department of Human Resources. — Former statute seemed both to accept the view that the Department of Human Resources loses the right to custody at age 17 and that the most suitable place of incarceration was in the Youthful Offender Division of the Department of Offender Rehabilitation (Corrections). *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976).

Cited in *England v. Bussiere*, 237 Ga. 814, 229 S.E.2d 655 (1976); *Crowley v. State*, 141 Ga. App. 867, 234 S.E.2d 700 (1977); *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the annotations for this Code section. See the editor's notes under the Chapter 7 heading.

Discretion of division in computing length of incarceration. — Inmate sentenced under the former chapter receives indeterminate sentence in custody of Youthful Offender Division of Department of Offender Rehabilitation (Corrections). The division was accorded a great deal of discretion in computing the length of time such an offender shall be incarcerated. 1981 Op. Att'y Gen. No. 81-62 (decided under former law).

Transfer of and computation of offender's term of custody. — A 16-year-old originally committed to the Department of Human Resources may be transferred on the youth's seventeenth birthday to the Department of Corrections by order of the committing court under the provisions of the former chapter; the offender's term of custody should be computed from the date of the offender's original conviction. 1975 Op. Att'y Gen. No. 75-47 (decided under former law).

Effect of language order. — Court order transferring a 17-year-old to the custody of the Department of Corrections is merely a modification of the offender's sentence pursuant to a prior judgment of conviction on a verdict of guilty; therefore, the offender's period of custody should be computed from the date of the offender's original conviction. 1975 Op. Att'y Gen. No. 75-47 (decided under former law).

Requirement to commit as youthful offender. — When a committing court has expressed the court's intention in writing to commit an individual as a youthful offender, the youth has been effectively transferred to the custody of the department. 1975 Op. Att'y Gen. No. 75-47 (decided under former law).

Placement of kidnapping offenders. — Kidnapping, not being punishable by death or imprisonment for life, is not an offense which requires the offender under 17 years of age to be placed in the sole custody of the Department of Offender Rehabilitation (Corrections); when the offender under 17 years of age is convicted of kidnapping for ransom or kidnapping in which the victim receives bodily injury, both being offenses punishable by life imprisonment or death, the youthful offender shall only be sentenced into the custody of the department. 1975 Op. Att'y Gen. No. 75-73 (decided under former law).

42-7-9. Construction of chapter.

(a) Nothing in this chapter shall limit or affect the power of any court to proceed in accordance with any other applicable provisions of law.

(b) Nothing in this chapter shall be construed in any way to amend, repeal, or affect the jurisdiction of the juvenile court system of this state.

(c) Nothing in this chapter shall be construed in any way to amend, repeal, or affect the jurisdiction of the State Board of Pardons and Paroles. A person sentenced under this chapter shall have his eligibility for parole computed in the same manner as other offenders sentenced to the jurisdiction of the department. (Code 1981, § 42-7-9, enacted by Ga. L. 1985, p. 420, § 1.)

Cross references. — Juvenile proceedings generally, T. 15, C. 11.

JUDICIAL DECISIONS

Cited in Woods v. State, 233 Ga. 347, 211 S.E.2d 300 (1974); Duncan v. State, 148 Ga. App. 685, 252 S.E.2d 190 (1979); Beasley v. State, 161 Ga. App. 737, 288 S.E.2d 759 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) are included in the annotations for this Code section. See the Editor's notes under the Chapter 7 heading.

Giving of standard sentence to previous offender by second court. — Subsection (a) of the former statute could be read as implicitly recognizing the power of a second court to give a standard prison sentence to a person who had previously been sentenced as a youthful offender. 1973 Op. Att'y Gen. No. 73-82 (decided under former law).

CHAPTER 8

PROBATION

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Advisory Council for Probation

Sec.

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Hearings and determinations; referral of cases to probation supervisors; probation or suspension of sentence; payment of fine or costs; disposition of defendant prior to hearing; continuing jurisdiction; transfer of probation supervision; probation fee.

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Terms and conditions of probation; supervision.

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42-8-35.6.	Family violence intervention program participation as condition of probation; cost borne by defendant.
42-8-35.7.	Drug and alcohol screening of probationers.
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42-8-39.	Suspension of sentence does not place defendant on probation.
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42-8-43.2.	Payments by state to county probation systems; merger of county systems into state-wide system.
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Probation of First Offenders

42-8-60.	Probation prior to adjudication of guilt; violation of probation; review of criminal record by judge.
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42-8-65.	Use of prior finding of guilt in subsequent prosecutions; release of records of discharge; modification of records to reflect conviction; effect of confinement sentence where guilt not adjudicated.
42-8-66.	Applicability.

Article 4

Participation of Probationers in Community Service Programs

42-8-70.	Definitions; unlawful to use offender for private gain except under certain circumstances; penalties.
42-8-71.	Application for participation in community service program; assignment of offenders; violations of court orders or article; limitation of liability.
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42-8-73.	Placement of offender with appropriate agency; schedul-

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ing for employed offenders; supervision; evaluation.

- 42-8-74. Applicability of Articles 2 and 3 of chapter; awarding of good-time allowance for offender providing live-in community service.

Article 5

Pretrial Release and Diversion Programs

- 42-8-80. Establishment and operation; rules and regulations.
 42-8-81. Release of person charged to program.
 42-8-82. Contracts with counties for services and facilities.
 42-8-83. Pretrial intervention programs.
 42-8-84. Approval required for release.

Article 6

Agreements for Probation Services

- 42-8-100. Jurisdiction of probation matters in ordinance violation cases; costs; agreements between chief judges of county courts or judges of municipal courts and corporations, enterprises, or agencies for probation services.
 42-8-101. County and Municipal Probation Advisory Council.
 42-8-102. Uniform professional standards and uniform contract standards.
 42-8-103. Quarterly report to judge and council; records to be open for inspection.
 42-8-104. Conflicts of interests prohibited — private entities.
 42-8-105. Conflicts of interests prohibited — public entities and employees prohibited from engaging in certain employment, business, or other activities that interfere with duties and responsibilities under this article.
 42-8-106. Confidentiality of records.
 42-8-107. Registration with council.
 42-8-108. Applicability of article to contractors for probation ser-

Sec.

vices; requirements for private corporations, private enterprises and private agencies entering into written contracts for services.

Article 7

Ignition Interlock Devices as Probation Condition

- 42-8-110. Definitions; applicability; purchase or lease of ignition interlock devices by counties, municipalities, or private entities; costs, fees, and deposits; participation by indigents.
 42-8-111. Court issuance of certificate for installation of ignition interlock devices; exceptions; completion of alcohol and drug use risk reduction program; notice of requirements; fees for driver's license.
 42-8-112. Timing for issuance of ignition interlock device limited driving permit; documentation required; reporting requirement.
 42-8-113. Renting, leasing, or lending motor vehicle to probationer subject to this article prohibited.
 42-8-114. Specifying provider for ignition interlock device.
 42-8-115. Certification of ignition interlock devices.
 42-8-116. Warning labels.
 42-8-116.1. Effect of failing to comply; previously installed devices.
 42-8-117. Revocation of driving privilege upon violation of probation imposed by Code Section 42-8-111.
 42-8-118. Requesting or soliciting another to blow into device; tampering with or circumventing operation of device.

Article 8

Diversion Center and Program

- 42-8-130. Establishment; obligations of respondent; confinement; fee; alternative methods of incarceration.

Article 9		Sec.	
Probation Management			
Sec.			exceptions to hearing requirement.
42-8-150.	Short title.	42-8-155.	Penalty for probation violation; hearing; waiver of hearing.
42-8-151.	Definitions.		
42-8-152.	Sentencing options systems; retention of jurisdiction by court.	42-8-156.	Finality of hearing officer's decision; review.
42-8-153.	System of administrative sanctions.	42-8-157.	Article not construed as repealing any court's probationary or supervisory power.
42-8-154.	Preliminary hearing for alleged violation of probation;	42-8-158.	Applicability of article.
		42-8-159.	Construction of article.

Law reviews. — For article, “A Review of Georgia’s Probation Laws,” see 6 Ga. St. B.J. 255 (1970).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Governmental Entity’s Liability for Injuries Caused by Negligently Released Individual, 19 POF2d 583.

ALR. — Right of convicted defendant to refuse probation, 28 ALR4th 736.

ARTICLE 1

ADVISORY COUNCIL FOR PROBATION

42-8-1. Creation; composition; selection of members; terms of office.

There is created the Advisory Council for Probation, to be composed of one superior court judge from each of the judicial administrative districts. The district council for each judicial administrative district shall select a superior court judge who shall be each respective district’s member of the council. The initial terms of office of the councilmembers shall be as follows: Districts 1 through 3, one year; Districts 4 through 6, two years; Districts 7 through 10, three years. Thereafter, all successors to the initial members of the council shall serve for terms of office of three years. Members of the advisory council shall be selected by the district councils, meeting in caucus called for such purpose by the administrative judge of each district. (Ga. L. 1980, p. 400, § 1; Ga. L. 2014, p. 866, § 42/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, revised language in this Code section.

42-8-2. Duty to consult and advise with Board and Department of Corrections; studies and surveys; recommendations; policy changes; meetings.

The Advisory Council for Probation shall meet, consult, and advise with the Board of Corrections and the Department of Corrections on questions and matters of mutual concern and interest relative to policy, personnel, and budget which pertain to probationary activities, powers, duties, and responsibilities of the board and the department. The advisory council shall institute such studies and surveys and shall make such recommendations to the board and department as the council deems wise and necessary and which, in the opinion of the council, will improve the effectiveness and efficiency of probation services rendered throughout the state. No change in existing policy of the board or the department relative to probation, if the magnitude of the change will result in a significant impact upon state-wide probationary services, or any such new policy, shall be instituted by the board or department without opportunity being afforded to the advisory council to advise and consult with the board or department on the proposed changes. However, the recommendations of the advisory council shall be advisory only and shall not bind the board or department. The board, the department, and the council shall meet periodically throughout each year for the purpose of improving the administration, efficiency, and effectiveness of probation services. (Ga. L. 1980, p. 400, § 2; Ga. L. 1985, p. 283, § 1.)

42-8-3. Staff director; reimbursement of members for expenses; operating funds.

The Advisory Council for Probation is authorized to employ and fix the compensation of a staff director, subject to the appropriation of funds for this position, who shall be responsible to the council and who shall discharge such duties and assignments as shall be assigned to him by the council. Members of the council shall be reimbursed for their actual expenses incurred in connection with the activities and responsibilities of the council. The funds necessary to meet the expenses of the council shall be met from funds appropriated to or otherwise available for the operation of the superior courts. (Ga. L. 1980, p. 400, § 3.)

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

ARTICLE 2

STATE-WIDE PROBATION SYSTEM

JUDICIAL DECISIONS

Construction. — State-wide probation defendant. *Helton v. State*, 166 Ga. App. 565, 305 S.E.2d 27 (1983).
system is strictly construed in favor of a

RESEARCH REFERENCES

ALR. — Revocation of probation based on defendant's misrepresentation or concealment of information from trial court, 36 ALR4th 1182.

42-8-20. Short title.

This article shall be known and may be cited as the "State-wide Probation Act." (Ga. L. 1956, p. 27, § 1.)

Cross references. — Payments into the Georgia Crime Victims Emergency Fund, T. 17, C. 15.

JUDICIAL DECISIONS

Exclusion of certain offenses. — Offenses punishable by death or life imprisonment are expressly omitted from the provisions of Ga. L. 1956, p. 27, § 1 (see now O.C.G.A. § 42-8-20 et seq.). *Brown v. State*, 246 Ga. 251, 271 S.E.2d 163 (1980).

42-8-21. Definitions.

Reserved. Repealed by Ga. L. 2012, p. 899, § 7-6/HB 1176, effective July 1, 2012.

Editor's notes. — This Code section was based on Code 1981, § 42-8-21; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect

at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 repeal of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

42-8-22. State-wide probation system for felony offenders created; administration generally.

There is created a state-wide probation system for felony offenders to be administered by the Department of Corrections. The probation system shall not be administered as part of the duties and activities of

the State Board of Pardons and Paroles. Separate files and records shall be kept with relation to the system. (Ga. L. 1956, p. 27, § 2; Ga. L. 1958, p. 15, § 1; Ga. L. 1962, p. 16, § 1; Ga. L. 1966, p. 56, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 2000, p. 1643, § 2.)

Editor's notes. — Ga. L. 1972, p. 1069, § 13, provides that the policy-making functions of the probation system be vested in the Board of Offender Rehabili-

tation (now Board of Corrections) and that the administrative functions be vested in the Department of Offender Rehabilitation (now Department of Corrections).

JUDICIAL DECISIONS

Cited in Vandiver v. Manning, 215 Ga. 874, 114 S.E.2d 121 (1960); Knowles v.

State, 159 Ga. App. 239, 283 S.E.2d 51 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Not administered as part of State Board of Pardons and Paroles. — Whatever right, if any, the State Board of Pardons and Paroles may have had to require waiver of extradition by probationers under Ga. L. 1943, p. 185 (see now O.C.G.A. Ch. 9, T. 42), it is clear that it retains no such right under Ga. L. 1956, p. 27 (see now O.C.G.A. Art. 2, Ch. 8, T. 42), for Ga. L. 1956, p. 27, § 2 (see now

O.C.G.A. § 42-8-22) provides that "such probation system shall not be administered as part of the duties and activities of the Board of Pardons and Paroles." 1958-59 Op. Att'y Gen. p. 223.

Board's functions are separate and distinct from those of the Department of Corrections' Probation Division. 1986 Op. Att'y Gen. No. 86-7.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 526-536. 59 Am. Jur. 2d, Pardon and Parole, § 74. 63A Am. Jur. 2d, Public Officers and Employees, §§ 21, 36, 37, 40, 44, 52, 56, 431 et seq., 448 et seq., 461.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2155-2165. 67 C.J.S., Officers, §§ 318, 323, 325. 67A C.J.S., Pardon and Parole, §§ 4-6, 18. 73 C.J.S., Public Administrative Law and Procedure, §§ 10, 11, 23, 36, 37.

42-8-23. Administration of supervision of felony probationers by Department of Corrections; graduated sanctions.

(a) As used in this Code section, the term "chief probation officer" means the highest ranking field probation officer in each judicial circuit who does not have direct supervision of the probationer who is the subject of the hearing.

(b) The department shall administer the supervision of felony probationers.

(c) If graduated sanctions have been made a condition of probation by the court and if a probationer violates the conditions of his or her probation, other than for the commission of a new offense, the department may impose graduated sanctions as an alternative to judicial

modification or revocation of probation, provided that such graduated sanctions are approved by a chief probation officer.

(d) The failure of a probationer to comply with the graduated sanction or sanctions imposed by the department shall constitute a violation of probation.

(e) A probationer may at any time voluntarily accept the graduated sanctions proposed by the department.

(f)(1) The department's decision shall be final unless the probationer files an appeal in the sentencing court. Such appeal shall be filed within 30 days of the issuance of the decision by the department.

(2) Such appeal shall first be reviewed by the judge upon the record. At the judge's discretion, a de novo hearing may be held on the decision. The filing of the appeal shall not stay the department's decision.

(3) When the sentencing judge does not act on the appeal within 30 days of the date of the filing of the appeal, the department's decision shall be affirmed by operation of law.

(g) Nothing contained in this Code section shall alter the relationship between judges and probation supervisors prescribed in this article nor be construed as repealing any power given to any court of this state to place offenders on probation or to supervise offenders. (Ga. L. 1972, p. 1069, § 14; Ga. L. 1977, p. 1209, § 2; Ga. L. 1978, p. 1647, § 3; Ga. L. 2000, p. 1643, § 2; Ga. L. 2012, p. 899, § 7-7/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted the present provisions of this Code section for the former provisions, which read: "The department shall administer the supervision of felony probationers. Nothing in this Code section shall alter the relationship between judges and probation supervisors prescribed in this article." See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall

apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

OPINIONS OF THE ATTORNEY GENERAL

State Board of Pardons and Paroles retains quasi-judicial functions and powers. — Except for the supervision of parolees and the assignment to the De-

partment of Offender Rehabilitation (Corrections) for administrative purposes only, the State Board of Pardons and Paroles retains its quasi-judicial functions and

powers as a result of the Executive Reorganization Act of 1972 (Ga. L. 1972, p. 1015, § 3). 1975 Op. Att'y Gen. No. 75-72.

JUDICIAL DECISIONS

Cited in *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

RESEARCH REFERENCES

ALR. — Probation officer's liability for negligent supervision of probationer, 44 ALR4th 638.

42-8-24. General duties of department; rules and regulations.

It shall be the duty of the department to supervise and direct the work of the probation supervisors provided for in Code Section 42-8-25 and to keep accurate files and records on all probation cases and persons on probation. It shall be the duty of the board to promulgate rules and regulations necessary to effectuate the purposes of this chapter. (Ga. L. 1956, p. 27, § 4; Ga. L. 1958, p. 15, § 4; Ga. L. 1967, p. 86, § 3; Ga. L. 1969, p. 945, § 1; Ga. L. 1972, p. 604, § 3.)

JUDICIAL DECISIONS

Cited in *Wright v. State*, 88 Ga. App. 868, 78 S.E.2d 61 (1953); *Vandiver v. Manning*, 215 Ga. 874, 114 S.E.2d 121 (1960).

RESEARCH REFERENCES

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, §§ 161-170.

42-8-25. Employment of probation supervisors; assignment to circuits by department.

The department shall employ probation supervisors. The department may assign one supervisor to each judicial circuit in this state or, for purposes of assignment, may consolidate two or more judicial circuits and assign one supervisor thereto. In the event the department determines that more than one supervisor is needed for a particular circuit, an additional supervisor or additional supervisors may be assigned to the circuit. The department is authorized to direct any probation supervisor to assist any other probation supervisor wherever assigned. In the event that more than one supervisor is assigned to the same office or to the same division within a particular judicial circuit, the department shall designate one of the supervisors to be in charge.

(Ga. L. 1956, p. 27, § 5; Ga. L. 1958, p. 15, § 5; Ga. L. 1965, p. 413, § 1; Ga. L. 1972, p. 604, § 4.)

Cross references. — Duties of probation officers, § 15-11-67.

JUDICIAL DECISIONS

Cited in Knowles v. State, 159 Ga. App. 239, 283 S.E.2d 51 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Circuit probation officers (now probation supervisors) are public officers and as a consequence hold office at the pleasure of the appointing power. 1968 Op. Att'y Gen. No. 68-461.

Chairman as full-time probation of-

ficer. — Chairman of a county board of commissioners may be employed as a full-time probation officer by the Board of Probation (now Department of Corrections). 1968 Op. Att'y Gen. No. 68-21.

42-8-26. Qualifications of probation supervisors; compensation and expenses; conflicts of interest; bonds.

(a) In order for a person to hold the office of probation supervisor, he or she must be at least 21 years of age at the time of appointment and must have completed a standard two-year college course, provided that any person who is employed as a probation supervisor on or before July 1, 1972, shall not be required to meet the educational requirements specified in this Code section, nor shall he or she be prejudiced in any way for not possessing the requirements. The qualifications provided in this Code section are the minimum qualifications and the department is authorized to prescribe such additional and higher educational qualifications from time to time as it deems desirable, but not to exceed a four-year standard college course.

(b) The compensation of the probation supervisors shall be set pursuant to the rules of the State Personnel Board. Probation supervisors shall also be allowed travel and other expenses as are other state employees.

(c)(1) No supervisor shall engage in any other employment, business, or activities which interfere or conflict with his or her duties and responsibilities as probation supervisor.

(2) No supervisor shall own, operate, have any financial interest in, be an instructor at, or be employed by any private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services.

(3) No supervisor shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit any supervisor from furnishing any probationer, upon request, the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any supervisor violating this paragraph shall be guilty of a misdemeanor.

(d) Each probation supervisor shall give bond in such amount as may be fixed by the department payable to the department for the use of the person or persons damaged by his or her misfeasance or malfeasance and conditioned on the faithful performance of his or her duties. The cost of the bond shall be paid by the department; provided, however, that the bond may be procured, either by the department or by the Department of Administrative Services, under a master policy or on a group blanket coverage basis, where only the number of positions in each judicial circuit and the amount of coverage for each position are listed in a schedule attached to the bond; and in such case each individual shall be fully bonded and bound as principal, together with the surety, by virtue of his or her holding the position or performing the duties of probation supervisor in the circuit or circuits, and his or her individual signature shall not be necessary for such bond to be valid in accordance with all the laws of this state. The bond or bonds shall be made payable to the department. (Ga. L. 1956, p. 27, § 6; Ga. L. 1958, p. 15, § 6; Ga. L. 1960, p. 1092, § 1; Ga. L. 1965, p. 413, § 2; Ga. L. 1967, p. 86, § 4; Ga. L. 1972, p. 604, § 5; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 3221, § 4; Ga. L. 1996, p. 1107, § 1; Ga. L. 2005, p. 334, § 24-1/HB 501; Ga. L. 2009, p. 745, § 2/SB 97; Ga. L. 2012, p. 446, § 2-63/HB 642.)

The 2012 amendment, effective July 1, 2012, inserted “or she” twice in the first sentence of subsection (a); substituted “set pursuant to the rules of the State Personnel Board” for “set by the State Personnel Board and the State Personnel Administration” in the first sentence of subsection (b); and inserted “or her” throughout subsection (d).

Editor’s notes. — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: “Personnel, equipment, and facilities that were as-

signed to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act.” This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: “Appropriations for functions which are transferred by this Act may be transferred as provided in Code Section 45-12-90.”

OPINIONS OF THE ATTORNEY GENERAL

Circuit probation officers (now probation supervisors) are public officers and as a consequence hold office at the pleasure of the appointing power. 1968 Op. Att’y Gen. No. 68-461.

Compensation of probation personnel under the State Merit System. — No compensation can be paid to any probation supervisor or other probation personnel employed by the Department of

Corrections and serving in the classified service of the State Merit System beyond that authorized in the compensation plan established by the State Personnel Board. 1989 Op. Att'y Gen. 89-39.

Owning or instructing in driver im-

provement school. — If a state probation officer is an owner of or instructor in a driver improvement school approved pursuant to O.C.G.A. § 40-5-83, a conflict of interest arises. 1984 Op. Att'y Gen. No. U84-29.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, §§ 14, 36, 37, 39, 40, 44, 45, 52, 56, 64 et seq., 68 et seq., 80 et seq., 431 et seq., 448 et seq., 461, 487 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 7, 15-20, 318, 322-326.

42-8-27. Duties of probation supervisors.

The probation supervisor shall supervise and counsel probationers in the judicial circuit to which he is assigned. Each supervisor shall perform the duties prescribed in this chapter and such duties as are prescribed by the department and shall keep such records and files and make such reports as are required of him. (Ga. L. 1956, p. 27, § 7; Ga. L. 1958, p. 15, § 7; Ga. L. 1972, p. 604, § 6.)

Cross references. — Applicability of this state's correction laws to probationers found in other states, T. 42, C. 11.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, § 27-2704 are included in annotations for this Code section.

Cited in Stephens v. State, 245 Ga. 835, 268 S.E.2d 330 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Probation supervisors as public officers. — Circuit probation officers (now probation supervisors) are public officers

and as a consequence hold office at the pleasure of the appointing power. 1968 Op. Att'y Gen. No. 68-461.

42-8-28. Assignment of probation supervisors among judicial circuits generally.

Probation supervisors shall be assigned among the respective judicial circuits based generally on the relative number of persons on probation in each circuit. (Ga. L. 1972, p. 604, § 15A.)

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536. § 1549 et seq. 24B C.J.S., Criminal Law, §§ 2144-2161.
C.J.S. — 24 C.J.S., Criminal Law,

42-8-29. Conduct of presentence investigations and preparation of reports of findings by probation supervisors; supervision of probationers; maintenance of records relating to probationers.

It shall be the duty of the probation supervisor to investigate all cases referred to him by the court and to make his findings and report thereon in writing to the court with his recommendation. The superior court may require, before imposition of sentence, a presentence investigation and written report in each felony case in which the defendant has entered a plea of guilty or nolo contendere or has been convicted. The probation supervisor shall cause to be delivered to each person placed on probation under his supervision a certified copy of the terms of probation and any change or modification thereof and shall cause the person to be instructed regarding the same. He shall keep informed concerning the conduct, habits, associates, employment, recreation, and whereabouts of the probationer by visits, by requiring reports, or in other ways. He shall make such reports in writing or otherwise as the court may require. He shall use all practicable and proper methods to aid and encourage persons on probation and to bring about improvements in their conduct and condition. He shall keep records on each probationer referred to him. (Ga. L. 1956, p. 27, § 9; Ga. L. 1972, p. 604, § 8.)

Cross references. — Applicability of this state's correction laws to probationers' found in other states, T. 42, C. 11.
Law reviews. — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 PRESENTENCE INVESTIGATION AND REPORT
 1. USE
 2. REVEALING CONTENTS TO COUNSEL
 3. PRESENTENCE AND POST-SENTENCE
 PROBATIONERS' CERTIFIED COPY OF SENTENCE

General Consideration

Pre-sentence report not required.
 — Under O.C.G.A. § 42-8-29, the trial court was not required, but was permitted, to order the preparation of a

pre-sentence investigation report prior to imposing a sentence. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).
 Defendant's claim of not knowingly and intelligently waiving the right to a pre-sentence investigation report

conducted by the county probation department was without merit because under O.C.G.A. § 42-8-29 the defendant did not have such a right. *Walker v. State*, 296 Ga. App. 763, 675 S.E.2d 496 (2009).

Cited in *Van Voltenburg v. State*, 138 Ga. App. 628, 227 S.E.2d 451 (1976); *Palmer v. State*, 144 Ga. App. 480, 241 S.E.2d 597 (1978); *Martin v. State*, 145 Ga. App. 880, 245 S.E.2d 70 (1978); *Huff v. McLarty*, 241 Ga. 442, 246 S.E.2d 302 (1978); *Bennett v. State*, 164 Ga. App. 239, 296 S.E.2d 787 (1982); *Jones v. State*, 165 Ga. App. 180, 300 S.E.2d 534 (1983); *Thompson v. State*, 276 Ga. 701, 583 S.E.2d 14 (2003).

Presentence Investigation and Report

1. Use

Use of report under § 42-8-34 in fixing sentence. — Presentence investigation report of former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) cannot be used in aggravation in fixing the length of the sentence. *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979).

Probation report cannot be offered in aggravation of sentence, regardless of whether it lists prior offenses. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, *West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000).

Information in the report filed under former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) cannot be regarded as “evidence” either in aggravation or in mitigation. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Trial court is authorized under O.C.G.A. §§ 42-8-29 and 42-8-34 to consider investigative reports prepared by probation officers for the purpose of deciding whether to suspend or probate all or part of the defendant’s sentence, but the court cannot use the reports to determine the length of the sentence. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

Use of report under § 17-10-2 in fixing sentence. — Presentence report under § 17-10-2 may be used as evidence in aggravation, thereby affecting the length

of sentence, only if the report had been made known to the defendant prior to the defendant’s trial. However, under former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) a presentence report was also authorized before pronouncing sentence for the purpose of deciding whether to suspend or probate all or part of the sentence to be imposed in a case. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

If the presentence report was used to determine length of sentence, the procedure set forth in § 17-10-2 must be followed; but if the report was used only to determine whether to probate or suspend all or a portion of the sentence, the report could be used. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Probation report cannot be offered in aggravation of sentence, regardless of whether it lists prior offenses. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, *West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000).

Use of previously undisclosed report. — Although use of a previously undisclosed probation report to aid the trial judge in determining whether to suspend or probate a sentence does not invalidate the sentence which is imposed, it cannot be used in fixing the length of the sentence. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, *West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000).

2. Revealing Contents to Counsel

Judge’s discretion to reveal content of report to counsel. — Since this section does not require the content of a presentence probation report to be shared with counsel, it is in the sound discretion of the trial judge whether to reveal the content of the report to counsel for the accused and for the state. *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Watts v. State*, 141 Ga. App. 127, 232 S.E.2d 590, cert. denied, 434 U.S. 925, 98 S. Ct. 405, 54 L. Ed. 2d 283 (1977); *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App.

Presentence Investigation and Report (Cont'd)

2. Revealing Contents to Counsel (Cont'd)

863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

Disclosure of report containing adverse matters. — When a presentence report contains any matter adverse to the defendant and likely to influence decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

3. Presentence and Post-sentence

Utility of labeling report as post-sentence or presentence. — Labeling an investigative report of the probation department as a "post-sentence" report, as distinguished from a "presentence" report, will not change the report's legal effect when the content, purpose, and function of the report are the same. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Trial court may not do indirectly — with a "post-sentence" report, that which *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) proscribes directly — using a "presentence" report to determine length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Utilizing later report to determine final length of sentence. — Trial court erred in imposing the maximum sentence with the intent of utilizing a later report to determine the final length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

"Presentence" and "post-sentence" reports. — There is no discernible difference between a "presentence" and

"post-sentence" report, except as to time of submission, and this is of no import when each is used for the same purpose. Thus, it is permissible to use a "presentence" or "post-sentence" report for the purpose of deciding whether to suspend or probate all or some part of a sentence. For the same reason it is impermissible to use a "presentence" or "post-sentence" report in fixing the length of the sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Use of "post-sentence" report to determine sentence. — Since the trial court intended to use the "post-sentence" report to determine the final length of the sentence, it was implicit that the trial court imposed the original sentence with the intent of determining a final length of sentence only after viewing the "post-sentence" investigative report. In such instance, *Munford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) and *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979) proscribed the use of the reports to determine "length" of sentence without compliance with the provisions of former Code 1933, § 27-2503 (see now O.C.G.A. § 17-10-2). *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Probationers' Certified Copy of Sentence

Purpose of giving probationers certified copy of sentence. — Purpose of the provision of this section which requires the circuit probation officers to give the probationers a certified copy of the sentence is to ensure that each probationer is familiar with the terms of the probationer's sentence. *Poss v. State*, 114 Ga. App. 609, 152 S.E.2d 695 (1966).

When failure to furnish certified copy not violative of sentence. — If the defendant is admittedly familiar with the terms of the defendant's sentence, the failure of the circuit probation officer to furnish the defendant with a certified copy of the defendant's sentence as required by this section does not violate the terms of the sentence. *Poss v. State*, 114 Ga. App. 609, 152 S.E.2d 695 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 488, 526-536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 12144-2161.

ALR. — Right of convicted defendant or prosecution to receive updated resentencing report at sentencing proceedings, 22 ALR5th 660.

42-8-29.1. Disposition of probation supervisor's documents upon committing of convicted person to institution.

(a) When a convicted person is committed to an institution under the jurisdiction of the department, any presentence or post-sentence investigation or psychological evaluation compiled by a probation supervisor or other probation official shall be forwarded to any division or office designated by the commissioner. Accompanying this document or evaluation will be the case history form and the criminal history sheets from the Federal Bureau of Investigation or the Georgia Crime Information Center, if available, unless any such information has previously been sent to the department pursuant to Code Section 42-5-50. A copy of these same documents shall be made available for the State Board of Pardons and Paroles. A copy of one or more of these documents, based on need, may be forwarded to another institution to which the defendant may be committed.

(b) The prison or institution receiving these documents shall maintain the confidentiality of the documents and the information contained therein and shall not send them or release them or reveal them to any other person, institution, or agency without the express consent of the probation unit which originated or accumulated the documents. (Code 1981, § 42-8-29.1, enacted by Ga. L. 1983, p. 697, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1989, p. 14, § 42.)

42-8-30. Supervision of juvenile offenders by probation supervisors.

In the counties where no juvenile probation system exists, juvenile offenders, upon direction of the court, shall be supervised by probation supervisors. Other than in this respect, nothing in this article shall be construed to change or modify any law relative to probation as administered by any juvenile court in this state. (Ga. L. 1956, p. 27, § 16; Ga. L. 1972, p. 604, § 12.)

Cross references. — Applicability of this state's correction laws to probationers' found in other states, T. 42, C. 11.

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Construction with other law. — Juvenile's interference with a juvenile probation officer's attempt to take the juvenile into custody, after the juvenile tested positive for illegal drug use, was sufficient to support an adjudication under O.C.G.A. § 16-10-24(b); moreover, the appeals court was not persuaded by the juvenile's contention that O.C.G.A. § 42-8-30 specif-

ically limited the role of the "probation supervisor" over juveniles to those counties in which no juvenile probation system existed. In the Interest of M.M., 287 Ga. App. 233, 651 S.E.2d 155 (2007), cert. denied, 2008 Ga. LEXIS 95 (Ga. 2008).

Cited in P.R. v. State, 133 Ga. App. 346, 210 S.E.2d 839 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536. 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 1-77.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161. 43 C.J.S., Infants, §§ 6-8.

42-8-30.1. Applicability to counties establishing probation system pursuant to Code Section 42-8-100.

In any county where the chief judge of the superior court, state court, municipal court, probate court, or magistrate court has provided for probation services for such court through agreement with a private corporation, enterprise, or agency or has established a county or municipal probation system for such court pursuant to Code Section 42-8-100, the provisions of this article relating to probation supervision services shall not apply to defendants sentenced in any such court. (Code 1981, § 42-8-30.1, enacted by Ga. L. 1991, p. 1135, § 1; Ga. L. 1993, p. 91, § 42; Ga. L. 2001, p. 813, § 1.)

42-8-31. Collection and disbursement of funds by probation supervisors; maintenance and inspection of records of accounts; bank accounts.

No probation supervisor shall collect or disburse any funds whatsoever, except by written order of the court; and it shall be the duty of the supervisor to transmit a copy of the order to the department not later than 15 days after it has been issued by the court. Every supervisor who collects or disburses any funds whatsoever shall faithfully keep the records of accounts as are required by the department, which records shall be subject to inspection by the department at any time. In every instance where a bank account is required, it shall be kept in the name of the "State Probation Office." (Ga. L. 1960, p. 1092, § 4; Ga. L. 1972, p. 604, § 15.)

Cross references. — Applicability of this state's correction laws to probationers' found in other states, T. 42, C. 11.

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Collection of supervision fee by department. — Department of Offender Rehabilitation (Corrections) may not on its own initiative collect supervision fee from probationers. 1981 Op. Att'y Gen. No. 81-100.

Collection of funds by probation office employees. — Department of Offender Rehabilitation (Corrections) may not enter into an arrangement with the Department of Human Resources in which employees of local probation offices, other than probation supervisors, may collect child support recovery unit money which arises from civil proceedings brought by the Department of Human Resources on behalf of errant fathers. 1982 Op. Att'y Gen. No. 82-99.

Payment of supervision fee by probationer. — Probationer's agreement to pay supervision fee should be obtained at time of sentencing and should be recorded. But, regardless of whether probationer agrees, the probationer can be required to pay a reasonable supervision fee as a condition of probation. 1981 Op. Att'y Gen. No. 81-100.

Retention of fee. — Probation supervision fee, collected pursuant to probation order of sentencing court, does not have a

statutory premise. Therefore, such a fee does not have to be paid into state treasury but, if permitted by probation order, could be retained by the Department of Offender Rehabilitation (Corrections). 1981 Op. Att'y Gen. No. 81-100.

Authority to collect payments of fines and restitution. — Collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Probation supervisors employed by the Probation Division of the Georgia Department of Corrections may collect voluntary payments of court-ordered fines and restitution after the expiration of periods of probation. 1987 Op. Att'y Gen. No. 87-10.

Withholding "collection fee" from fines. — Since expenses of Department of Offender Rehabilitation (Corrections) in supervising probationers are not a proper cost of prosecution, the department cannot withhold "collection fee" to offset these costs from fines which it collects. 1981 Op. Att'y Gen. No. 81-100.

42-8-32. Funds which may be collected by probation supervisors.

No probation supervisor shall be directed to collect any funds other than funds directed to be paid as the result of a criminal proceeding. (Ga. L. 1956, p. 27, § 14; Ga. L. 1958, p. 15, § 10; Ga. L. 1960, p. 1148, § 3; Ga. L. 1972, p. 604, § 10; Ga. L. 1989, p. 380, § 3.)

Cross references. — Applicability of this state's correction laws to probationers' found in other states, T. 42, C. 11.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 232 (1989).

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Vague sentence on charge of abandonment. — Since the sentence on a charge of abandonment did not specify whether the payments required thereunder were in the nature of a fine or a payment for the support of the defendant's child or children, and failed to specify where or to whom the payments were to be made, this provision of the sentence

was too vague and indefinite to be enforceable, and a revocation of the probation sentence solely on the ground that the defendant did not make the payments specified was without authority of law. *Guest v. State*, 87 Ga. App. 184, 73 S.E.2d 218 (1952) (decided under former law).

Cited in *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930).

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Collection of abandonment and bastardy payments. — In this section, there is no proviso excluding abandonment and bastardy cases and, since both are declared to be misdemeanors, funds directed to be paid as the result of such cases would be the result of "criminal proceedings" as defined in this section, and the probation officers may be ordered to collect the funds. 1963-65 Op. Att'y Gen. p. 514.

Probation office employees. — Department of Offender Rehabilitation (Corrections) may not enter into an arrangement with the Department of Human Resources in which employees of local probation offices, other than probation supervisors, may collect child support recovery unit money which arises from civil proceedings brought by the Department of Human Resources on behalf of errant fathers. 1982 Op. Att'y Gen. No. 82-99.

Collection of supervision fee by department. — Department of Offender Rehabilitation (Corrections) may not on its own initiative collect supervision fee from probationers. 1981 Op. Att'y Gen. No. 81-100.

Payment of fee by probationer. — Probationer's agreement to pay supervision fee should be obtained at time of sentencing and should be recorded. But, regardless of whether the probationer agrees, the probationer can be required to pay a reasonable supervision fee as a

condition of probation. 1981 Op. Att'y Gen. No. 81-100.

Retention of fee. — Probation supervision fee, collected pursuant to probation order of sentencing court, does not have a statutory premise. Therefore, such a fee does not have to be paid into the state treasury but, if permitted by the probation order, could be retained by the Department of Offender Rehabilitation (Corrections). 1981 Op. Att'y Gen. No. 81-100.

Authority to collect payments of fines and restitution. — Collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Probation supervisors employed by the Probation Division of the Georgia Department of Corrections may collect voluntary payments of court-ordered fines and restitution after the expiration of periods of probation. 1987 Op. Att'y Gen. No. 87-10.

Withholding of "collection fee" from fines. — Since expenses of Department of Offender Rehabilitation (Corrections) in supervising probationers are not a proper cost of prosecution, the department cannot withhold "collection fee" to offset these costs from fines which it collects. 1981 Op. Att'y Gen. No. 81-100.

42-8-33. Audits of accounts of probation supervisors; records and reports of audits; bonds of auditors; limitation on refunding overpayment of fines, restitutions, or moneys owed.

(a) The department shall make periodic audits of each probation supervisor who, by virtue of his duties, has any moneys, fines, court costs, property, or other funds coming into his control or possession or being disbursed by him. The department shall keep a permanent record of the audit of each probation supervisor's accounts on file. It shall be the duty of the employee of the department conducting the audit to notify the department in writing of any discrepancy of an illegal nature that might result in prosecution. The department shall have the right to interview and make inquiry of certain selected payors or recipients of funds, as it may choose, without notifying the probation supervisor, to carry out the purposes of the audit. The employee who conducts the audit shall be required to give bond in such amount as may be set by the department, in the same manner and for the same purposes as provided under Code Section 42-8-26 for the bonds of probation supervisors. The bond shall bind the employee and his surety in the performance of his duties.

(b) Any overpayment of fines, restitutions, or other moneys owed as a condition of probation shall not be refunded to the probationer if the amount of such overpayment is less than \$5.00. (Ga. L. 1960, p. 1092, § 2; Ga. L. 1965, p. 413, § 5; Ga. L. 1967, p. 86, § 5; Ga. L. 1972, p. 604, § 13; Ga. L. 1987, p. 452, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, "overpayment" was twice substituted for "overpay-ment" in subsection (b).

42-8-34. Hearings and determinations; referral of cases to probation supervisors; probation or suspension of sentence; payment of fine or costs; disposition of defendant prior to hearing; continuing jurisdiction; transfer of probation supervision; probation fee.

(a) Any court of this state which has original jurisdiction of criminal actions, except juvenile courts, municipal courts, and probate courts, in which the defendant in a criminal case has been found guilty upon verdict or plea or has been sentenced upon a plea of nolo contendere, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(b) Prior to the hearing, the court may refer the case to the probation supervisor of the circuit in which the court is located for investigation and recommendation. The court, upon such reference, shall direct the

supervisor to make an investigation and to report to the court, in writing at a specified time, upon the circumstances of the offense and the criminal record, social history, and present condition of the defendant, together with the supervisor's recommendation; and it shall be the duty of the supervisor to carry out the directive of the court.

(c) Subject to the provisions of subsection (a) of Code Section 17-10-1 and subsection (f) of Code Section 17-10-3, if it appears to the court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon the defendant but may stay and suspend the execution of the sentence or any portion thereof or may place him on probation under the supervision and control of the probation supervisor for the duration of such probation. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed on the defendant.

(d)(1) In every case that a court of this state or any other state sentences a defendant to probation or any pretrial release or diversion program under the supervision of the department, in addition to any fine or order of restitution imposed by the court, there shall be imposed a probation fee as a condition of probation, release, or diversion in the amount equivalent to \$23.00 per each month under supervision, and in addition, a one-time fee of \$50.00 where such defendant was convicted of any felony. The probation fee may be waived or amended after administrative process by the department and approval of the court, or upon determination by the court, as to the undue hardship, inability to pay, or any other extenuating factors which prohibit collection of the fee; provided, however, that the imposition of sanctions for failure to pay fees shall be within the discretion of the court through judicial process or hearings. Probation fees shall be waived on probationers incarcerated or detained in a departmental or other confinement facility which prohibits employment for wages. All probation fees collected by the department shall be paid into the general fund of the state treasury, except as provided in subsection (f) of Code Section 17-15-13, relating to sums to be paid into the Georgia Crime Victims Emergency Fund. Any fees collected by the court under this paragraph shall be remitted not later than the last day of the month after such fee is collected to the Georgia Superior Court Clerks' Cooperative Authority for deposit into the general fund of the state treasury.

(2) In addition to any other provision of law, any person convicted of a violation of Code Section 40-6-391 or subsection (b) of Code Section 16-13-2 who is sentenced to probation or a suspended

sentence by a municipal, magistrate, probate, recorder's, mayor's, state, or superior court shall also be required by the court to pay a one-time fee of \$25.00. The clerk of court, or if there is no clerk the person designated to collect fines, fees, and forfeitures for such court, shall collect such fee and remit the same not later than the last day of the month after such fee is collected to the Georgia Superior Court Clerks' Cooperative Authority for deposit into the general fund of the state treasury.

(3) In addition to any fine, fee, restitution, or other amount ordered, the sentencing court may also impose as a condition of probation for felony criminal defendants sentenced to a day reporting center an additional charge, not to exceed \$10.00 per day for each day such defendant is required to report to a day reporting center; provided, however, that no fee shall be imposed or collected if the defendant is unemployed or has been found indigent by the sentencing court. The charges required by this paragraph shall be paid by the probationer directly to the department. Funds collected by the department pursuant to this subsection shall only be used by the department in the maintenance and operation of the day reporting center program.

(e) The court may, in its discretion, require the payment of a fine or costs, or both, as a condition precedent to probation.

(f) During the interval between the conviction or plea and the hearing to determine the question of probation, the court may, in its discretion, either order the confinement of the defendant without bond or may permit his release on bond, which bond shall be conditioned on his appearance at the hearing and shall be subject to the same rules as govern appearance bonds. Any time served in confinement shall be considered a part of the sentence of the defendant.

(g) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of the person's probated sentence. The judge is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence, including ordering the probationer into the sentencing options system, as provided in Article 9 of this chapter, at any time during the period of time prescribed for the probated sentence to run.

(h) Notwithstanding any provision of this Code or any rule or regulation to the contrary, if a defendant is placed on probation in a county of a judicial circuit other than the one in which he resides for committing any misdemeanor offense, such defendant may, when specifically ordered by the court, have his probation supervision transferred to the judicial circuit of the county in which he resides. (Code

1933, § 27-2702; Ga. L. 1939, p. 285, § 4; Ga. L. 1941, p. 481, § 1; Ga. L. 1950, p. 352, §§ 1, 2; Ga. L. 1956, p. 27, § 8; Ga. L. 1958, p. 15, § 8; Ga. L. 1960, p. 1148, § 1; Ga. L. 1972, p. 604, § 7; Ga. L. 1980, p. 1136, § 1; Ga. L. 1988, p. 988, § 1; Ga. L. 1989, p. 381, §§ 2, 3; Ga. L. 1992, p. 3221, § 5; Ga. L. 1993, p. 426, § 1; Ga. L. 1998, p. 840, § 2; Ga. L. 1999, p. 1271, § 1; Ga. L. 2000, p. 1643, § 2; Ga. L. 2001, p. 4, § 42; Ga. L. 2001, p. 94, § 6; Ga. L. 2004, p. 775, § 3; Ga. L. 2005, p. ES3, § 26; Ga. L. 2005, p. 60, § 42/HB 95; Ga. L. 2009, p. 124, § 1/HB 344.)

Cross references. — Sentence and punishment generally, T. 17, C. 10. Abandonment of child generally, T. 19, C. 10. Suspension of sentence in abandonment cases, § 19-10-1(j).

Editor's notes. — Ga. L. 1999, p. 1271, § 2, not codified by the General Assembly, provides that the amendment by this Act shall apply with respect to sentences entered on or after that July 1, 1999.

Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the '2001 Crime Prevention Act.'"

Ga. L. 2009, p. 124, § 2/HB 344, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to persons convicted on or after July 1, 2009.

Law reviews. — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

For note on the 2001 amendment to this Code section, see 18 Ga. St. U.L. Rev. 47 (2001).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under Ga. L. 1913, p. 112 and 113 are included in the annotations for this Code section.

Ga. L. 1913, p. 113 had no reference to habeas corpus. Cook v. Jenkins, 146 Ga. 704, 92 S.E. 212 (1917) (decided under former Ga. L. 1913, p. 113).

Term "sentencing judge" in O.C.G.A. § 42-8-34(g) refers to the office and not the person. Smith v. State, 250 Ga. App. 128, 550 S.E.2d 683 (2001), overruled on

other grounds, Lewis v. McDougal, 276 Ga. 861, 583 S.E.2d 859 (2003).

Refusal to release prisoner. — While original sentence and order revoking probation are still in force, it is not error to refuse to release prisoner upon habeas corpus although the evidence upon such hearing showed no violation of the conditions of probation. Troup v. Carter, 154 Ga. 481, 114 S.E. 577 (1922) (decided under former Ga. L. 1913, p. 112).

Sentencing error. — Trial court erred in sentencing person convicted of murder to life imprisonment plus probation to be

served under the supervision of the sentencing court. *Brown v. State*, 246 Ga. 251, 271 S.E.2d 163 (1980).

Sentence of 10 days in jail followed by 12 months probation for conviction of driving under the influence was improper. *Kovacs v. State*, 227 Ga. App. 870, 490 S.E.2d 539 (1997).

Crime lab fee of \$25 should not have been imposed under O.C.G.A. § 42-8-34(d)(2) in the driving under the influence case under O.C.G.A. § 40-6-391 because the defendant was not sentenced to probation on the driving under the influence count. *Johnson v. State*, 282 Ga. App. 258, 638 S.E.2d 406 (2006).

Sentencing court could consider defendant's illegal alien status. — Trial court did not violate the defendant's constitutional rights by considering the defendant's illegal alien status a relevant factor in formulating an appropriate sentence within the statutory range for burglary under O.C.G.A. § 16-7-1(a); the trial court properly considered that the court could not order the defendant to work as a condition of probation. *Trujillo v. State*, 304 Ga. App. 849, 698 S.E.2d 350 (2010).

Cited in *Streetman v. State*, 70 Ga. App. 192, 27 S.E.2d 704 (1943); *Buice v. Bryan*, 212 Ga. 508, 93 S.E.2d 676 (1956); *Daniel v. Whitlock*, 222 Ga. 192, 149 S.E.2d 79 (1966); *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970); *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972); *Calhoun v. Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974); *Barnett v. Hopper*, 234 Ga. 694, 217 S.E.2d 280 (1975); *Dailey v. State*, 136 Ga. App. 866, 222 S.E.2d 682 (1975); *Patton v. Ricketts*, 236 Ga. 293, 223 S.E.2d 635 (1976); *Van Voltenburg v. State*, 138 Ga. App. 628, 227 S.E.2d 451 (1976); *Decker v. State*, 139 Ga. App. 707, 229 S.E.2d 520 (1976); *McKisic v. State*, 238 Ga. 644, 234 S.E.2d 908 (1977); *Patat v. State*, 142 Ga. App. 398, 236 S.E.2d 143 (1977); *Warner v. Jones*, 241 Ga. 467, 246 S.E.2d 320 (1978); *Handsford v. State*, 147 Ga. App. 665, 249 S.E.2d 768 (1978); *Stallworth v. State*, 150 Ga. App. 766, 258 S.E.2d 611 (1979); *Cofer v. Hawthorne*, 154 Ga. App. 875, 270 S.E.2d 84 (1980); *Johnson v. State*, 156 Ga. App. 511, 274 S.E.2d 669 (1980); *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980);

Turnipseed v. State, 158 Ga. App. 266, 279 S.E.2d 725 (1981); *State v. Hasty*, 158 Ga. App. 464, 280 S.E.2d 873 (1981); *Dilas v. State*, 159 Ga. App. 39, 282 S.E.2d 690 (1981); *Fowler v. State*, 159 Ga. App. 496, 283 S.E.2d 710 (1981); *Jackson v. State*, 248 Ga. 480, 284 S.E.2d 267 (1981); *Johns v. State*, 160 Ga. App. 535, 287 S.E.2d 617 (1981); *Stillwell v. State*, 161 Ga. App. 230, 288 S.E.2d 295 (1982); *Howard v. State*, 161 Ga. App. 743, 289 S.E.2d 815 (1982); *Jones v. State*, 165 Ga. App. 180, 300 S.E.2d 534 (1983); *Strickland v. State*, 165 Ga. App. 197, 300 S.E.2d 537 (1983); *Pooler v. Taylor*, 173 Ga. App. 859, 328 S.E.2d 749 (1985); *Taylor v. State*, 181 Ga. App. 199, 351 S.E.2d 723 (1986); *Acker v. State*, 184 Ga. App. 321, 361 S.E.2d 509 (1987); *Harrison v. State*, 201 Ga. App. 577, 411 S.E.2d 738 (1991); *Cauldwell v. State*, 211 Ga. App. 417, 439 S.E.2d 90 (1993); *Hermann v. State*, 249 Ga. App. 535, 548 S.E.2d 666 (2001); *Huzzie v. State*, 253 Ga. App. 225, 558 S.E.2d 767 (2002); *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Hearing and Determination

Stage of proceedings to determine probation. — Language of this section seems to refer to probation as a part of the original sentence, and the provision for a hearing must, considering the language as a whole, refer to a hearing on the type of sentence to be imposed, and not authorize the court, at a subsequent term, to add to the sentence a provision for probation when the court made no provision relating thereto in the first instance. *Phillips v. State*, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

Consideration of conduct during trial. — Trial court may properly consider the defendant's conduct during trial in considering whether to suspend or probate all of the sentence, and such a consideration does not come within the restrictions of O.C.G.A. § 17-10-2. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

Consideration of conduct prior to sentencing. — Trial court did not err in considering information as to an altercation between the defendant and a deputy sheriff taking the defendant to the defen-

Hearing and Determination (Cont'd)

dant's cell during the trial prior to sentencing when the sentence was already set and the information complained of was considered by the trial court merely to determine what portions would be served on probation or incarceration. *Fields v. State*, 167 Ga. App. 816, 307 S.E.2d 712 (1983).

Juvenile court adjudications considered. — It is not unconstitutional to use juvenile court adjudications to determine whether subsequent felony conviction should be probated. *Brawner v. State*, 250 Ga. 125, 296 S.E.2d 551 (1982).

Omission of presentence hearing. — It is error to omit the presentence hearing to decide on the defendant's punishment after the verdict. *Howard v. State*, 161 Ga. App. 743, 289 S.E.2d 815 (1982).

Evidentiary hearing not available. — Probationer was not entitled to an evidentiary hearing on a motion to modify probation. *Ardeneaux v. State*, 225 Ga. App. 461, 484 S.E.2d 74 (1997).

Parole board may admit hearsay evidence. — Hearsay evidence which the board admits like that which is admissible because it comes within an exception to the hearsay rule is not subject to the general principle that hearsay evidence has no probative value even if admitted without objection. *Williams v. Lawrence*, 273 Ga. 295, 540 S.E.2d 599 (2001).

Referral for Investigation and Recommendation

Referral of case to probation officer not jurisdictional. — Court sentencing the defendant has jurisdiction of the probation features of the case and may refer the case to a circuit probation officer (now probation supervisor) for investigation and recommendation prior to hearing, but the fact that the court has placed the defendant on probation without such referral does not mean either that the court is without jurisdiction to revoke the probation, or that the statutory provisions do not apply. *Harrington v. State*, 97 Ga. App. 315, 103 S.E.2d 126 (1958).

Authority of private probation officer. — Probation officer who was an em-

ployee of a private corporation retained to provide probation supervision services in misdemeanor cases pursuant to O.C.G.A. § 42-8-100 was still an officer of the court and could file a petition to revoke the defendant's probation on a misdemeanor shoplifting charge; probation officer's action did not constitute the practice of law let alone the unauthorized practice of law. *Huzzie v. State*, 253 Ga. App. 225, 558 S.E.2d 767 (2002).

Use of juvenile court record in investigation report. — Former Juvenile Code clearly authorized the use of the juvenile court record in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report. *Jones v. State*, 129 Ga. App. 623, 200 S.E.2d 487 (1973).

Adjudications or dispositions under the former Juvenile Code and its predecessors did not constitute a "criminal record," but a juvenile court record would be included within the appellant's "social history". *Jones v. State*, 129 Ga. App. 623, 200 S.E.2d 487 (1973).

Presentence Investigation and Report

1. In General

Ordering of probation report. — It is in discretion of court whether or not to order probation report. *Belcher v. State*, 173 Ga. App. 509, 326 S.E.2d 857 (1985).

Whether or not to order a probation report to determine whether the defendant's sentence should be suspended or whether the defendant should be placed on probation is within the sound discretion of the trial judge. *Hill v. State*, 212 Ga. App. 386, 441 S.E.2d 863 (1994).

Statutory reports compared. — Reports under O.C.G.A. § 42-8-34 are more diverse in the type of information the reports may contain since the reports are used only in determining the question of suspension or probation of sentence and need not be shown to counsel, whereas, reports under O.C.G.A. § 17-10-2 are more restrictive and must be shown to counsel before trial. *Moss v. State*, 159 Ga. App. 317, 283 S.E.2d 275 (1981).

Not to be regarded as evidence. — Information in report filed cannot be re-

garded as "evidence" either in aggravation or in mitigation. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

2. Use

Consideration for deciding whether to suspend or revoke sentence. — O.C.G.A. § 42-8-34 authorizes the trial judge to consider investigation reports for the purpose of deciding whether to suspend or probate all or part of the sentence. Although authorized for consideration on the question of probation, in practice such reports may be considered by the trial judge in reducing the length of the sentence. *Bentley v. Willis*, 247 Ga. 461, 276 S.E.2d 639 (1981).

Trial court is authorized under O.C.G.A. §§ 42-8-29 and 42-8-34 to consider investigative reports prepared by probation officers for the purpose of deciding whether to suspend or probate all or part of the defendant's sentence, but the court cannot use the reports to determine the length of the sentence. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

Probation report cannot be offered in aggravation of sentence, regardless of whether the report lists prior offenses. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, *West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000).

Use of previously undisclosed report. — Although use of a previously undisclosed probation report to aid the trial judge in determining whether to suspend or probate a sentence does not invalidate the sentence which is imposed, the report cannot be used in fixing the length of the sentence. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, *West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000).

Use as evidence in aggravation. — Presentence report under former Code 1933, § 27-2503 (see now O.C.G.A. § 17-10-2) may be used as evidence in aggravation, thereby affecting the length of sentence, only if the report had been made known to the defendant prior to the defendant's trial. However, under former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) a presentence report was also authorized before pronouncing sentence

for the purpose of deciding whether to suspend or probate all or part of the sentence to be imposed in a case. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Use in determining length of sentence. — If the presentence report was to be used to determine length of sentence, the procedure set forth in former Code 1933, § 27-2503 (see now O.C.G.A. § 17-10-2) must be followed; but, if the report was to be used only to determine whether to probate or suspend all or a portion of the sentence, the report could be used. The presentence investigation report cannot be used in aggravation in fixing the length of the sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

3. Disclosure of Contents to Counsel

Judge's discretion to reveal content of report to counsel. — Since this section does not require the content of a presentence probation report to be shared with counsel, it is in the sound discretion of the trial judge whether to reveal the content of the report to counsel for the accused and for the state. *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975); *Benfield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Watts v. State*, 141 Ga. App. 127, 232 S.E.2d 590, cert. denied, 434 U.S. 925, 98 S. Ct. 405, 54 L. Ed. 2d 283 (1977); *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

Disclosure of presentence report containing adverse matters. — If a presentence probation officer's report contains any matter adverse to the defendant and likely to influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975); *Benfield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839,

Presentence Investigation and Report (Cont'd)
3. Disclosure of Contents to Counsel (Cont'd)

64 L. Ed. 2d 263 (1980).

Notification by court of intent to use matters in aggravation. — When the trial court intends to consider matters in aggravation that were ruled inadmissible during the guilt-innocence phase of the trial, the court must inform defense counsel and the prosecution of the court's plans in this regard before the presentence hearing. Absent such notice from the trial court judge, the defense and the prosecution cannot adequately prepare their cases or summon their witnesses for the presentence hearing. *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978).

4. Presentence and Post-sentence

Effect of labeling report as post-sentence or presentence. — Labeling an investigative report of the probation department as a "post-sentence" report, as contra-distinguished from a "presentence" report, will not change the report's legal effect where the content, the purpose, and function of the report are the same. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Trial court may not do indirectly — with a "post-sentence" report, that which *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) proscribes directly — using a "presentence" report to determine the length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Utilizing later report to determine final length of sentence. — Trial court erred in imposing the maximum sentence with the intent of utilizing a later report to determine the final length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Difference between "presentence" and "post-sentence" reports. — Because there is no discernible difference between a "presentence" and "post-sentence" report, except as to time of submission, this is of no import when each is used for the same purpose. Thus, it is permissible to use a "presentence" or

"post-sentence" report for the purpose of deciding whether to suspend or probate all or some part of a sentence. For the same reason it is impermissible to use a "presentence" or "post-sentence" report in fixing the length of the sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

When the trial court intended to use the "post-sentence" report to determine the final length of the sentence, it was implicit that the trial court imposed the original sentence with the intent of determining a final length of sentence only after viewing the "post-sentence" investigative report. In such instance, *Munford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) and *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979), proscribe the use of the reports to determine "length" of sentence without compliance with the provisions of former Code 1933, § 27-2503 (see now O.C.G.A. § 17-10-2). *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Condition Precedent to Probation

Payment of fine as condition precedent. — Condition of sentence to be served on probation may include the immediate payment of a fine. Such a sentence does not violate the due process and equal protection clause of U.S. Const., amend. 14. *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S. Ct. 712, 58 L. Ed. 2d 520 (1978), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

Ability of defendant to pay fine. — Because the ability of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation without violation, a conditionally probated sentence is not necessarily invidious discrimination based on wealth if the sentencing judge has determined that the defendant would not be a good candidate for probation unless a fine is paid first. *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S. Ct. 712, 58 L. Ed. 2d 520 (1978), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

Condition of probation which stipulated that the defendant pay a fine "as and when directed by probation officer" without having held a hearing on the defendant's indigency did not violate O.C.G.A. § 42-8-34 since payment of the fine was not a condition precedent to the entry upon probation. *Whitehead v. State*, 207 Ga. App. 891, 429 S.E.2d 536 (1993).

Defendant must be aware of condition precedent. — While a court may lawfully require the payment of a fine as a condition precedent to being allowed to begin a probationary period, due process demands that the defendant be made aware that such condition is in fact a condition precedent. *Huff v. McLarty*, 241 Ga. 442, 246 S.E.2d 302 (1978).

Conditioning probation on lump sum payment of fine. — Probation of a jail sentence may constitutionally be conditioned upon payment of a fine in lump sum when the defendant is indigent and unable to make immediate payment of the fine. *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S. Ct. 712, 58 L. Ed. 2d 520 (1978), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

Condition not to engage in practice of law permissible. — Inclusion in a probation order of the condition that the defendant not engage in the practice of law for a period of one year was within the sound discretion of the court in probating the sentence and was authorized under former Code 1933, § 27-202 and Ga. L. 1965, p. 413, § 3 (see now O.C.G.A. §§ 42-8-34 and 42-8-35). *Yarbrough v. State*, 119 Ga. App. 46, 166 S.E.2d 35 (1969).

Probation or Suspension of Sentence

Probated confinement held excessive. — After a repeat offender was convicted on two counts of misdemeanor theft, and the trial court imposed probated confinement for a period of five years when the maximum period of confinement which could be imposed was for a term of one year, this error was not harmless as both sentences ran consecutively and one of the conditions of the

probation was, that in the event probation was revoked, the trial court could order the execution of the sentence originally imposed. *Tenney v. State*, 194 Ga. App. 820, 392 S.E.2d 294 (1990).

Benefit of the doubt should be given to the accused. — Trial court's attempt to revoke part of the defendant's probated sentence for theft was a nullity because, although an earlier court order was ambiguous about whether or not the probation provisions for both offenses had been revoked, the benefit of the doubt should be given to the accused. *Merneigh v. State*, 271 Ga. 883, 525 S.E.2d 362 (2000).

Notice and hearing prior to revocation of suspended sentence. — Sentence which is suspended cannot be revoked as to the suspension feature without notice and opportunity to be heard. This is true as the modification may be made only after hearing and a finding by the court that the defendant has failed to comply with the terms under which the sentence was suspended. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

Crimes to which probation of sentence permissible. — It is within the power of the court to pass probation sentence when the defendant has been convicted of criminally abandoning the defendant's child. *Towns v. State*, 25 Ga. App. 419, 103 S.E. 724, cert. denied, 25 Ga. App. 841 (1920).

It is within the power of the court to pass probation sentence after the defendant was convicted of operating an automobile while intoxicated. *Jones v. State*, 27 Ga. App. 631, 110 S.E. 33 (1921).

Placing defendant on probation. — Under this section, the court may, upon a verdict of guilty in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation which would authorize discharge without court adjudication of guilt in the event the defendant did not violate probation. *Winget v. State*, 138 Ga. App. 433, 226 S.E.2d 608, overruled on other grounds, *Quick v. State*, 139 Ga. App. 440, 228 S.E.2d 592 (1976).

Probating sentence after passage of more than four terms of court. — Trial

Probation or Suspension of Sentence (Cont'd)

court had authority to probate the defendant's sentence to confinement, even though more than four terms of court had passed since conviction and sentence, when the court did not intend the court's sentence to be the final sentence and probated the confinement after receiving a post-sentence investigator's report. *State v. Johnson*, 183 Ga. App. 236, 358 S.E.2d 840, cert. denied, 183 Ga. App. 907, 358 S.E.2d 840 (1987).

Duration or condition required. — In imposing sentence of a fine to be suspended on condition that the defendant not violate state law, the trial court was required to set a duration on that condition, not to exceed the maximum sentence which could be imposed for the offense. *Hirjee v. State*, 226 Ga. App. 573, 487 S.E.2d 40 (1997).

Prospective revocation of probation. — When the defendant's probation was revoked before the probation began, the defendant's probation was improperly revoked under former O.C.G.A. § 17-10-1, which was the statute in effect at the time that defendant committed the crimes that led to the revocation of probation; former O.C.G.A. § 17-10-1, which was subject to O.C.G.A. § 42-8-34(g), did not grant the authority to revoke probation before the probation began. *Jones v. State*, 260 Ga. App. 401, 579 S.E.2d 827 (2003).

Trial court did not err in modifying the probationary portion of the defendant's sentence by imposing a condition banishing defendant from the subdivision in which the defendant committed burglaries because the trial court's original sentencing order included as a special condition of probation that the defendant was to avoid all contact with the burglary victims, each of whom lived in the subdivision at issue, and to the extent that the modified sentence simply clarified the scope of that special condition, it was contemplated within the terms of the original sentence pursuant to O.C.G.A. § 42-8-34(g); the banishment provision was reasonable, narrow in scope, and included only the subdivision in which the victims resided, and in the

absence of a hearing transcript or any record evidence to the contrary, the court of appeals had to presume that the trial court properly considered the evidence before it. *Tyson v. State*, 301 Ga. App. 295, 687 S.E.2d 284 (2009).

Registration for public indecency proper as part of probation. — Because the defendant's sex offender registration as part of probation was limited to the maximum sentence allowed by law as punishment for that crime, the trial court did not improperly give the defendant an indeterminate sentence by requiring the defendant to register as a sexual offender following the defendant's conviction for felony public indecency. *Loya v. State*, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

Sentence upon revocation of probation. — Trial court had the authority to revoke the defendant's first offender status and enter an adjudication of guilt for the defendant's violations of probation, pursuant to O.C.G.A. §§ 42-8-34(g) and 42-8-60(b), because the defendant was still serving the defendant's probated sentence. Further, because the trial court, when pronouncing the defendant's first offender sentence, advised the defendant that, upon adjudication of guilt, the defendant could be resentenced to the statutory maximum for two counts of child molestation, and that the time served would be credited against the defendant's new sentence, the trial court was authorized to increase the sentence originally imposed. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

Continuing Jurisdiction of Sentencing Court

Retention for entire term of probation. — Sentencing judge retains jurisdiction over the probated person during the entire term of such probated sentence, but cannot revoke any sentence which has expired at the time the revocation proceedings are had, nor revoke any future sentence which has not begun to run at the time of such revocation proceedings. *Todd v. State*, 108 Ga. App. 615, 134 S.E.2d 56 (1963).

O.C.G.A. § 42-8-29 did not violate the constitutional principle of separation of powers, as a probation supervisor had a

duty to make the supervisor's findings and report regarding an alleged probation revocation in writing to the court with the supervisor's recommendation; not unlike a district attorney, the probation supervisor was an employee of the Department of Corrections, within the executive branch of state government, and was charged with providing the trial court with information relevant to pending criminal proceedings over which the court alone exercised judicial authority. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Authority of judge. — Trial judge is granted power and authority to suspend or probate a determinate sentence; the judge does not have authority to do both. *Jones v. State*, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

Modification of conditions of probation. — Prior to this section's enactment, a trial judge did not have authority to suspend the execution of a sentence, except to review the judgment upon which the sentence was imposed. *Henry v. State*, 77 Ga. App. 735, 49 S.E.2d 681 (1948).

If the conditions of probation are believed to be illegal, the appellant may apply for modification under the provisions of this section which continues jurisdiction of probation in the sentencing judge. *Dean v. Whalen*, 234 Ga. 182, 215 S.E.2d 7 (1975), overruled on other grounds, *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008).

Expansion of power of modification granted to the sentencing court applies only to the probated portion of a split-time sentence. *Burns v. State*, 153 Ga. App. 529, 265 S.E.2d 859 (1980).

Trial court's power to rescind, modify, or change a sentence "at any time" is limited by its terms to the sentence itself or its conditions and the court may not go behind the sentence to readdress the merits of a plea which was ruled on in a preceding term. *State v. James*, 211 Ga. App. 149, 438 S.E.2d 399 (1993).

Trial court had authority to require the defendant to undergo treatment as a sex offender after the defendant began serving the defendant's probated sentence, and the addition of such a condition was authorized whether or not there had been a violation of existing conditions of proba-

tion. *Edwards v. State*, 216 Ga. App. 740, 456 S.E.2d 213 (1995).

Order modifying the trial court's prior banishment order imposed as a condition of the defendant's probation was upheld on appeal, as was the denial of the defendant's motion to withdraw a negotiated plea because: (1) the defendant's sentence was independent, and thus, not part of the negotiated plea agreement; and (2) the trial court adequately considered that the defendant's crimes were likely motivated by the relationship the defendant had with the victim, the defendant's ex-spouse, where the ex-spouse resided and worked, as well as where the ex-spouse's immediate family lived, by determining that the banishment order was issued to protect those affected, but also served a rehabilitative purpose by removing a temptation by the defendant to re-offend. *Hallford v. State*, 289 Ga. App. 350, 657 S.E.2d 10 (2008).

Trial court did not err in modifying the probationary portion of the defendant's sentence because the court retained jurisdiction to modify the terms of the defendant's probation; although the trial court's order modifying the defendant's probated sentence was not entered until the subsequent term of court, the state filed its motion to modify the sentence within the same term in which the sentence was originally rendered. *Tyson v. State*, 301 Ga. App. 295, 687 S.E.2d 284 (2009).

Defendant's double jeopardy and due process rights were not violated by the process the trial court followed in imposing certain special conditions of probation. The trial court had authority under O.C.G.A. § 42-8-34(g) to modify the probation conditions throughout the period of the sentence and the special conditions of probation did not, individually or in the aggregate, constitute additional punishment. *Stephens v. State*, 289 Ga. 758, 716 S.E.2d 154 (2011).

Requiring showing of child support payments did not constitute an illegal increase in sentence. — Defendant who complained that the defendant was unable to pay restitution because the defendant was also paying child support was ordered, as a condition of probation, to provide proof of the child support pay-

Continuing Jurisdiction of Sentencing Court (Cont'd)

ments that the defendant made. Given that this condition did not increase the amount the defendant was obligated to pay as part of the defendant's sentence, the condition did not constitute an illegal increase in that sentence under O.C.G.A. § 42-8-34(g). *Polly v. State*, 323 Ga. App. 893, 748 S.E.2d 696 (2013).

Trial court did not err in denying the defendant's motion to vacate the defendant's sentence because the probation modification did not constitute punishment since the trial court retained jurisdiction to modify or change the probated sentence and changing the no violent contact order to no contact was not punishment but, rather, was for the purpose of protecting the victim. *Bell v. State*, 323 Ga. App. 751, 748 S.E.2d 114 (2013).

Availability of habeas relief to probationer. — While a sentencing court retains jurisdiction over a defendant during any period of probation and may modify or correct the probated sentence as necessary, a writ of habeas corpus is an available avenue of relief in cases wherein a defendant not only seeks a modification of the conditions of the probation but also asserts that the sentence imposed was unconstitutional. To the extent that *Dean v. Whalen*, 234 Ga. 182 (1975), holds to the contrary, it is overruled. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

Effect of other law. — There was no modification of the defendant's probation when an original condition of probation was that the defendant make regular reports to the defendant's probation officer as directed and when that condition was later clarified to require that the defendant submit out-of-state travel plans to the defendant's probation officer so that the probation department could comply with an interstate compact relating to interstate travel of sex offenders. *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998).

Section modified by § 17-10-1. — Former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34), which provided that

the court should not lose jurisdiction over a defendant during the term of a probated sentence, but should have power to change or modify the sentence during the period of time originally described for the probated sentence to run, had been modified by Ga. L. 1974, p. 352, §§ 3 and 4 (see now O.C.G.A. § 17-10-1) which provided that after the term of court at which a sentence was imposed by a judge, the judge shall have no authority to suspend, probate, modify, or change the sentence of the prisoner, except as otherwise provided. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

Court's discretion in revocation hearing. — In a revocation of probation hearing, the trial court, as the trier of fact, has very wide discretion and evidence of misconduct of the probationer is sufficient when no manifest abuse of discretion has been shown. *Barron v. State*, 158 Ga. App. 172, 279 S.E.2d 299 (1981).

Basis for revoking defendant's probation. — When the defendant and the trial judge agreed on restitution as a condition of the defendant's probated sentence, and since there was evidence that the defendant was able to pay other bills, and the defendant continued to operate the defendant's business and pay business expenses, this could and did serve as the basis of the defendant's probation revocation. *Fong v. State*, 149 Ga. App. 456, 254 S.E.2d 460 (1979).

Revocation of probation based on subsequent crime. — Nothing in O.C.G.A. § 42-8-34 prevents the revocation of the probated portion of a sentence based upon a separate crime committed during the portion of the sentence to be served in confinement. *Layson v. Montgomery*, 251 Ga. 359, 306 S.E.2d 245 (1983).

Amending or revoking sentence before commencement of sentence. — Trial court has no power to amend and modify a sentence in a criminal case after the term during which the sentence was imposed; accordingly, if the defendant had been sentenced to an indeterminate term in the penitentiary without any provision for probation, the court properly refused to entertain a motion made at a subsequent term that the sentence be modified

so as to allow the defendant to serve the sentence on probation. *Phillips v. State*, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

Court has no power to amend a sentence or revoke the sentence's probationary or suspended feature before the term of sentence has commenced to run, except in the case of the exercise of the plenary power of the court to amend, modify, or rescind judgments during the term of court in which the sentences are entered; and it is error to order the revocation of such sentence, the term of which is not in effect at the time of the purported revocation. *Todd v. State*, 107 Ga. App. 771, 131 S.E.2d 201 (1963).

Revocation of sentence being served. — Probated or suspended sentence may be revoked provided the sentence being revoked is in effect and being served at the time the order of revocation is made, even though the act upon which the revocation is based was committed prior to the date the defendant actually begins serving such probated sentence, but after the date of the imposition of the sentence. *Todd v. State*, 108 Ga. App. 615, 134 S.E.2d 56 (1963).

Court revoking probation because of a subsequent conviction may not make the revoked sentence consecutive to an intervening sentence. *England v. Newton*, 238 Ga. 534, 233 S.E.2d 787 (1977).

Probated portion of a sentence may be revoked or modified at any time during the term of the probated sentence, after hearing and finding of probation violation. *Logan v. Lee*, 247 Ga. 608, 278 S.E.2d 1 (1981).

Revoking court may not increase the original sentence; thus, the language "modify or change" in former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) was limited by Ga. L. 1966, p. 440, § 1 (see now O.C.G.A. § 42-8-38). *England v. Newton*, 238 Ga. 534, 233 S.E.2d 787 (1977).

While under former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34), the trial court had jurisdiction to change or modify the terms of the original sentence, it cannot, under former Code 1933, §§ 27-2502 and Ga. L. 1956, p. 27, § 12 (see now O.C.G.A. §§ 17-10-1 and 42-8-38), increase the sentence originally

passed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

Suspended sentence cannot exceed maximum sentence of confinement.

— Once service of a suspended sentence begins, either by incarceration or probation, the sentence cannot exceed the maximum sentence of confinement which could have been imposed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

Misdemeanors. — For a misdemeanor, the probated sentence must be considered served at the end of the 12-month period. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

Revocation of sentence commencing at future date. — By reading former Code 1933, §§ 27-2502 and 27-2702 (see now O.C.G.A. §§ 17-10-1 and 42-8-34), a trial judge can revoke a probated sentence that was to begin at a future date. *Parrish v. Ault*, 237 Ga. 401, 228 S.E.2d 808 (1976); *Roberts v. State*, 148 Ga. App. 708, 252 S.E.2d 209 (1979).

Following the 1992 amendments of O.C.G.A. § 17-10-1, the trial court no longer has the power to revoke a probation sentence that has not yet begun. *Lombardo v. State*, 244 Ga. App. 885, 537 S.E.2d 143 (2000).

Amending sentence during same court term by shortening imprisonment. — Power of a superior court in a criminal case to amend a sentence during the same term of the court in which the sentence was imposed, by shortening the period of imprisonment, is not lost by entry of the defendant upon the service of such sentence. When, by an amendment so made during the same term, the period of service in the penitentiary, as fixed in a sentence for a reducible felony, is changed to a shorter term in the county correctional institution as for a misdemeanor, the amendment may also provide for service of the misdemeanor sentence, or any remainder thereof, on probation. *Gobles v. Hayes*, 194 Ga. 297, 21 S.E.2d 624 (1942).

Modification of sentence. — O.C.G.A. § 42-8-34 does not allow a trial judge to modify a defendant's sentence after the term of court has expired. *Levell v. State*, 247 Ga. App. 615, 544 S.E.2d 523 (2001).

Continuing Jurisdiction of Sentencing Court (Cont'd)

Increase in child-support payments before suspension revoked. — Increase in the amount of the child-support payments pursuant to O.C.G.A. § 42-8-34 does not constitute double punishment or jeopardy if the defendant's sentence has been suspended and suspension has not been revoked. *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

Resentencing as first offender inappropriate. — After a defendant was convicted for statutory rape, the trial court lacked jurisdiction to resentence the defendant as a first offender or to rescind the conviction or confinement portion of the sentence. First offender treatment was only permitted before a defendant had been adjudicated guilty and sentenced. *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Use of juveniles' psychological tests. — If appropriate safeguards to protect the confidentiality of the records were undertaken, results of psychological tests administered to juveniles appearing in the juvenile court could be computerized and could be used in later court proceedings. 1983 Op. Att'y Gen. No. U83-25.

Requirement to place defendant on probation. — Unless the judge expressly states in the judge's order that the judge is placing the defendant on probation, the defendant receives the sentence which is prescribed. 1968 Op. Att'y Gen. No. 68-398.

Retention of jurisdiction despite appeal. — Court originally passing sentence which includes placing the defendant on probation retains jurisdiction to revoke, rescind, or modify such probated sentence, notwithstanding that the original case was appealed when the decision of the appellate court was made the decision of trial court. 1962 Op. Att'y Gen. p. 134.

Awarding earned time against probated sentence would frustrate intent of sentencing judge who has made a previous judicial determination under O.C.G.A. §§ 17-10-1 and 42-8-34 that the particular individual should be subject to a specific period of supervision and control while the individual is being reintegrated into society. 1982 Op. Att'y Gen. No. 82-58.

Inmate who actually serves three years incarceration of six-year sentence should receive only three years credit against concurrent ten-year probated sentence, and if the ten-year probated sentence is later revoked, all time served prior to

revocation, including time served in prison pursuant to the separate sentence, should be considered only as probation time, meaning nonearning time under O.C.G.A. § 42-5-100. 1982 Op. Att'y Gen. No. 82-58.

Computation of sentence after parole and one year of probation revoked. — When the inmate receives a sentence of 15 years, ten years to be served in confinement and the remaining five years to be served on probation; after three years and seven months of confinement the inmate is paroled; one year of the probated portion of the sentence is revoked after parole for ten months; and parole is revoked one month later, the inmate would be entitled to full credit for the three years and seven months the inmate spent in incarceration and the ten-month period the inmate served on parole and would be required to serve the remaining five years and seven months on the original ten-year confinement sentence plus an additional one year of the probated portion of the sentence which was revoked. 1986 Op. Att'y Gen. No. 86-7.

Requirement to contribute for probation supervisors' insurance. — Probationer can be required to pay by court order, as a condition of his/her probation, a reasonable amount toward the cost of maintaining insurance to protect probation supervisors from personal liability should probationers be injured while performing court-ordered community service. 1983 Op. Att'y Gen. No. 83-18.

Retention of jurisdiction during term of probation. — Court retains jurisdiction over a probationer during the

term of the probationary sentence for the purpose of changing or modifying the order placing a defendant on probation during the whole of the probationary term imposed, or until the court finds that the conditions of probation have been breached. 1945-47 Op. Att'y Gen. p. 107.

Service of entire sentence by youthful offender. — Judge may require service of the entire sentence, even though the service of such sentence would run past the fourteenth or twenty-first birthday of the child; this conclusion is based on the fact that the age of the child designates only the length of jurisdiction to "revoke," rather than jurisdiction per se. 1963-65 Op. Att'y Gen. p. 514.

Child abandonment prosecution not barred by bastardy prosecution. — Bastardy prosecution is not a bar to a subsequent child abandonment prosecution. 1969 Op. Att'y Gen. No. 69-323.

Liability of father for failure to support. — Father is criminally liable, throughout the minority of his illegitimate child, for a failure to support that child. 1969 Op. Att'y Gen. No. 69-323.

Suspended sentence in abandonment and bastardy cases is permissible and the court may retain jurisdiction of the offender until the offender's child has reached the age designated by the statute. 1963-65 Op. Att'y Gen. p. 514.

Hearing for probation violator. — Probation violator may be returned to the sentencing court for a hearing or the violator may have a hearing in a court of equivalent original criminal jurisdiction within the county wherein the probationer resides for purposes of supervision upon the giving of ten days' written notice to the sentencing court prior to the hearing on the merits. 1965-66 Op. Att'y Gen. No. 66-257.

Collection of funds by probation officer. — Upon proper court order, the probation officers would be authorized to collect funds made payable in connection with suspended sentences. 1963-65 Op. Att'y Gen. p. 4.

Power of Board of Corrections to change probation. — Board of Offender Rehabilitation (Corrections) does not have power to change the conditions of probation; these, including travel restrictions, could be changed only by order of the sentencing court. 1971 Op. Att'y Gen. No. U71-83.

Board prohibited from placing terms on probationer not required by court. — Board of Probation (now Board of Corrections) or its agents may not place on a prisoner, in connection with the prisoner's probation, any terms or conditions not required of the prisoner by court order passed by the trial judge at the conclusion of the hearing held for the purpose of considering the prisoner's probation. 1958-59 Op. Att'y Gen. p. 223.

Revocation. — Board has jurisdiction to revoke "probation" or conditional release granted by the board; but during that period in which the inmate is serving a portion of the sentence on probation ordered by the court, the court has jurisdiction of revocation proceedings. 1970 Op. Att'y Gen. No. 70-201.

Some courts excluded from working with probation supervisors. — Courts in which state offenses cannot be tried are excluded from working with the probation supervisors. 1979 Op. Att'y Gen. No. U79-27.

Authority of county recorder's court. — County recorder's court does not have authority to place persons convicted of traffic offenses under the supervision of probation supervisors of the Department of Offender Rehabilitation (Corrections). 1979 Op. Att'y Gen. No. U79-27.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536. 63A Am. Jur. 2d, Public Officers and Employees, § 460.

C.J.S. — 24 C.J.S., Criminal Law, §§ 1996, 1998, 2032, 2060, 2066, 2075-2078, 2144-2161.

ALR. — Power of trial court to change sentence after affirmance, 23 ALR 536.

Constitutionality of statute conferring on court power to suspend sentence, 26 ALR 399; 101 ALR 402; 109 ALR 1048; 132 ALR 819; 158 ALR 1315.

Imposition or enforcement of sentence which has been suspended without authority, 141 ALR 1225.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 ALR2d 1001.

Consideration of accused's juvenile court record in sentencing for offense committed as adult, 64 ALR3d 1291.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 ALR3d 474.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 ALR3d 976.

Propriety of conditioning probation upon defendant's posting of bond guaranteeing compliance with terms of probation, 79 ALR3d 1068.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 79 ALR3d 1083.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 ALR3d 781.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

Sufficiency of hearsay evidence in probation revocation hearings, 21 ALR6th 771.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as condition of pretrial release, 46 ALR6th 63.

42-8-34.1. Requirements for revocation of probated or suspended sentence; restitution or fines; limitation on probation supervision.

(a) For the purposes of this Code section, the term "special condition of probation or suspension of the sentence" means a condition of a probated or suspended sentence which:

(1) Is expressly imposed as part of the sentence in addition to general conditions of probation and court ordered fines and fees; and

(2) Is identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and require the defendant to serve up to the balance of the sentence in confinement.

(b) A court may not revoke any part of any probated or suspended sentence unless the defendant admits the violation as alleged or unless the evidence produced at the revocation hearing establishes by a preponderance of the evidence the violation or violations alleged.

(c) At any revocation hearing, upon proof that the defendant has violated any general provision of probation or suspension other than by commission of a new felony offense, the court shall consider the use of alternatives to include community service, intensive probation, diversion centers, probation detention centers, special alternative incarceration, or any other alternative to confinement deemed appropriate by the court or as provided by the state or county. In the event the court determines that the defendant does not meet the criteria for said alternatives, the court may revoke the balance of probation or not more than two years in confinement, whichever is less.

(d) If the violation of probation or suspension alleged and proven by a preponderance of the evidence or the defendant's admission is the commission of a felony offense, the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the felony offense constituting the violation of the probation. For purposes of this Code section, the term "felony offense" means:

(1) A felony offense;

(2) A misdemeanor offense committed in another state on or after July 1, 2010, the elements of which are proven by a preponderance of evidence showing that such offense would constitute a felony if the act had been committed in this state; or

(3) A misdemeanor offense committed in another state on or after July 1, 2010, that is admitted to by the defendant who also admits that such offense would be a felony if the act had been committed in this state.

(e) If the violation of probation or suspension alleged and proven by a preponderance of the evidence or the defendant's admission is the violation of a special condition of probation or suspension of the sentence, the court may revoke the probation or suspension of the sentence and require the defendant to serve the balance or portion of the balance of the original sentence in confinement.

(f) The payment of restitution or reparation, costs, or fines ordered by the court may be payable in one lump sum or in periodic payments, as determined by the court after consideration of all the facts and circumstances of the case and of the defendant's ability to pay. Such payments shall, in the discretion of the sentencing judge, be made either to the clerk of the sentencing court or, if the sentencing court is a probate court, state court, or superior court, to the probation office serving said court.

(g) In no event shall an offender be supervised on probation for more than a total of two years for any one offense or series of offenses arising out of the same transaction, whether before or after confinement, except as provided by paragraph (2) of subsection (a) of Code Section 17-10-1. (Code 1981, § 42-8-34.1, enacted by Ga. L. 1988, p. 1911, § 1; Ga. L. 1989, p. 855, § 1; Ga. L. 1992, p. 3221, § 6; Ga. L. 2001, p. 94, § 7; Ga. L. 2010, p. 318, § 1/HB 329.)

Editor's notes. — Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the '2001 Crime Prevention Act.'"

Law reviews. — For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006).

For note on 1989 amendment of this Code section, see 6 Ga. St. U.L. Rev. 287

(1989). For note on the 2001 amendment of this Code section, see 18 Ga. St. U.L. Rev. 47 (2001).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATIONS

EVIDENCE SUFFICIENT FOR REVOCATION

EVIDENCE INSUFFICIENT FOR REVOCATION

General Considerations

Fourth Amendment not violated. — Police were not acting in bad faith or in an arbitrary and capricious manner when the police searched the defendant's home since the defendant waived Fourth Amendment rights for probation and the police had a reasonable suspicion that there were drugs present. *Reece v. State*, 257 Ga. App. 137, 570 S.E.2d 424 (2002).

Failure to warn of consequences for violations. — Sentencing court's failure to warn a defendant, in writing, as to the consequences of violating the terms of probation was not substantial compliance with O.C.G.A. § 42-8-34.1(a)(2). *Harvey v. Meadows*, 280 Ga. 166, 626 S.E.2d 92 (2006).

Because the relevant sentencing documents failed to state that a probationer's failure to complete a diversion center program would result in the court revoking probation and requiring the probationer to serve the balance of the original sentence in prison, and the original sentencing form did not comply with O.C.G.A. § 42-8-34.1, the trial court erred in revoking the remainder of the probationer's probation term; moreover, despite the state's contention that the probationer waived any issue regarding the wording of the sentence by consenting to the consent order, there was no basis found in the record for the appeals court to find such. *Gamble v. State*, 290 Ga. App. 37, 658 S.E.2d 785 (2008).

Trial court erred in revoking the defendant's probation under O.C.G.A. § 42-8-34.1 because the original sentencing form did not adequately warn the defendant in writing of the consequences of violating a special condition; thus, the defendant was entitled to resentencing.

Sheppard v. State, 319 Ga. App. 813, 738 S.E.2d 662 (2013).

Amended statute governed revocation. — O.C.G.A. § 42-8-34.1 governs the requirements for revocation of a probated sentence, and specifically repealed, without a savings clause, the prior statutory provision and all conflicting laws; the amended provision precluded the trial court from considering the prior, unamended statute during a revocation hearing as the court was bound by the revocation requirements in effect at the time defendant's probation was revoked, not at the time the defendant was sentenced to probation. *Gardner v. State*, 259 Ga. App. 375, 577 S.E.2d 69 (2003).

Trial court properly revoked a probationer's term of probation, pursuant to O.C.G.A. § 42-8-34.1 as amended, requiring the probationer to serve the full balance of the remaining sentence as the probationer failed to report to a probation supervisor as directed in the probation order and any violation of the special conditions could result in the revocation of the entire balance of probation and require the probationer to serve up to the balance of the sentence in confinement. *Hill v. State*, 270 Ga. App. 114, 605 S.E.2d 831 (2004).

Evidence required for revocation of probation. — Habeas court utilized the incorrect standard as a conviction was not necessary for a revocation of more than two years of probation; all that was required by former O.C.G.A. § 42-8-34.1(d) was that the felony upon which the revocation of probation was based be proved by a preponderance of the evidence, or by the defendant's admission of the felony's commission. *Lewis v. Sims*, 277 Ga. 240, 587 S.E.2d 646 (2003).

Hearsay evidence insufficient for probation revocation. — Trial court

abused its discretion in revoking the defendant's probation based upon incompetent and insufficient evidence; the only evidence that a crime was committed was an officer's hearsay testimony that the officer was told that an air compressor was stolen and that testimony was offered only to show the officer's reasons for conducting an investigation. *Smith v. State*, 283 Ga. App. 317, 641 S.E.2d 296 (2007).

Revocation based on misdemeanor.

— Because the revocation petition did not specify which Code section the defendant was alleged to have violated for the drug-related objects offense and instead simply accused the defendant of possessing certain specified drug-related objects, the only violation alleged and proven fell under O.C.G.A. § 16-13-32.2, a misdemeanor; therefore, the trial court was not authorized to revoke more than two years of the defendant's outstanding probation. *Henley v. State*, 317 Ga. App. 776, 732 S.E.2d 836 (2012).

Probation revocation's two-year limitation. — When, after the defendant's probation revocation hearing, the trial court ordered the defendant to serve six months in jail for each of the seven probation violations found to total three and one-half years, that order violated the plain words of subsection (b) of O.C.G.A. § 42-8-34.1, limiting confinement for probation revocation to no more than two years. *Cockrell v. Brown*, 263 Ga. 345, 433 S.E.2d 585 (1993).

Revocation of the balance of four and one-half years of the defendant's probation based on the commission of two new violent misdemeanors was error because, when the sole basis for revoking probation is the commission of a new misdemeanor, whether violent or not, the cap is two years. *Lawrence v. State*, 228 Ga. App. 745, 492 S.E.2d 727 (1997).

O.C.G.A. § 42-8-34.1(c) placed a two-year limitation on the period of confinement which may be ordered when probation was revoked because of a violation of a general provision of probation; a trial court's revocation order, which could possibly have been construed as ordering more than two years in confinement, was improper. *Jordan v. State*, 279 Ga. App. 399, 635 S.E.2d 163 (2006).

Probation conditions violated by a defendant were not special conditions under O.C.G.A. § 42-8-34.1 because the conditions were not imposed in addition to general conditions and court-ordered fines and fees; thus, the trial court was not authorized to revoke the balance of the defendant's probation and to require the defendant to serve more than two years in confinement. *Chester v. State*, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

When nothing in the record showed that the trial court considered alternatives to confinement, the court erred in ordering a defendant who had violated probation to serve more than two years in confinement. *Chester v. State*, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

Two-year limitation did not apply.

— Trial court did not err in revoking defendant's probation and requiring defendant to serve five years in a probation detention center as the use of the probation detention center was an appropriate alternative; pursuant to O.C.G.A. § 42-8-34.1(c), the two-year maximum for confinement in jail did not apply. *Syms v. State*, 257 Ga. App. 521, 571 S.E.2d 514 (2002).

Trial court erred in ordering a probationer to serve three years because the sentence was a term of confinement greater than that specified in O.C.G.A. § 42-8-34.1(c). *Klicka v. State*, 315 Ga. App. 635, 727 S.E.2d 248 (2012).

Limits on years of probation revoked. — Under O.C.G.A. § 42-8-34.1(d) and (e), violation of a special condition of probation can result in revocation of more than two years of probation; violation of a general condition of probation authorizes the revocation of no more than two years of probation. *Gardner v. State*, 259 Ga. App. 375, 577 S.E.2d 69 (2003).

Under O.C.G.A. § 42-8-34.1(d), a trial court was authorized to revoke no more than the lesser of the balance of probation or the maximum time of sentence authorized for the crime constituting a violation of the defendant's probation; since the maximum sentence for the crime constituting a violation of the defendant's probation, felony obstruction, was five years, the trial court erred in revoking over eight years of probation. *Gibson v. State*, 279 Ga. App. 838, 632 S.E.2d 740 (2006).

General Considerations (Cont'd)

Trial court properly revoked the defendant's probation as a result of finding by a preponderance of the evidence that the defendant engaged in a conspiracy to commit a forgery by buying a roll of holograph-imprinted laminate from an inmate to make fraudulent driver's licenses; but the trial court erred in revoking seven instead of just five years of the defendant's probation because, pursuant to O.C.G.A. § 42-8-34.1(d), the maximum sentence authorized was the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the crime constituting the violation of the probation. Since conspiracy to commit first degree forgery was punishable by no more than five years imprisonment, and the defendant had seven years of probation left, only five years should have been revoked. *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

Burden is on the state to prove a violation of probation by a preponderance of the evidence. *Farmer v. State*, 216 Ga. App. 515, 455 S.E.2d 297 (1995).

Effect of change in quantum of proof. — That the quantum of proof necessary to revoke probation has been changed from "slight evidence" to "a preponderance of the evidence" does not affect the rule that a ruling in favor of the probationer, continuing rather than revoking probation, has no collateral estoppel effect in a subsequent criminal trial. *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990).

Authority to order full sentence. — Municipal court was not authorized to order the full sentence into execution upon revocation of a suspended sentence. *Hughes v. Town of Tyrone*, 211 Ga. App. 616, 440 S.E.2d 58 (1994).

When probationer both committed a felony and violated a special condition, the revocation court was authorized to dispose of probationer as having either violated a special condition or committed a felony. *Manville v. Hampton*, 266 Ga. 857, 471 S.E.2d 872 (1996).

Evidence inadmissible when untimely notice to defendant. — Sentence of defendant to confinement for two

years, eight months, and fifteen days upon revocation of probation was reversed because the sentence exceeded the two-year limitation of O.C.G.A. § 42-8-34.1. *Gordon v. State*, 217 Ga. App. 271, 456 S.E.2d 761 (1995).

Failure of state to prove reliability of drug test. — Revocation of probation based on defendant's failure of a drug test was error since the test result lacked probative value and no expert testimony was offered by the state to prove the scientific reliability of the ontrack system as used for the purpose of drug detection. *Bowen v. State*, 242 Ga. App. 631, 531 S.E.2d 104 (2000).

On appeal from an order revoking a probationer's probation, the trial court erred by admitting the results of a Roche "OnTrack Test" without a showing that the test had reached a scientific state of verifiable certainty, which would allow admission of the test's results in the absence of expert testimony; on remand, the court was directed to determine whether the court would have revoked the balance of the probation term based upon the probationer's failure to comply with the special condition of restitution standing alone, or impose a lesser penalty instead. *Mann v. State*, 285 Ga. App. 39, 645 S.E.2d 573 (2007).

Probation detention center not "prison." — Defendant's confinement in a probation detention center was not equivalent to confinement in prison for purposes of O.C.G.A. § 42-1-12(g) because under O.C.G.A. § 42-8-34.1(c), such centers were alternatives to confinement in prison, and therefore the 10-year waiting period for release from sex offender registration requirements did not begin running upon the defendant's release from the center, but from the date the defendant was released from probation. In re *White*, 306 Ga. App. 365, 702 S.E.2d 694 (2010).

Issue of improper revocation of probation cognizable on habeas corpus. — Claim that probation was improperly revoked due to lack of substantial compliance with O.C.G.A. § 42-8-34.1 regarding the conditions imposed on the probation was a cognizable issue for purposes of a habeas corpus proceeding under

O.C.G.A. § 9-14-42(a) as confinement under a sentence that was longer than that permitted by state law invoked a constitutional right. *Harvey v. Meadows*, 280 Ga. 166, 626 S.E.2d 92 (2006).

Ex post facto inquiry. — To determine if an ex post facto violation resulted from use of the applied law in a probation revocation matter, the law in effect at the time of the probation revocation must be measured against the law in effect at the time of the initial offense, not the law in effect at the time of the act that resulted in probation revocation. *Walker v. Brown*, 281 Ga. 468, 639 S.E.2d 470 (2007).

No ex post facto violation. — Use of the amended version of O.C.G.A. § 42-8-34.1 when an appellant's probation was revoked due, in part, to the appellant's failure to abide by a special condition of the probation, did not implicate ex post facto concerns inasmuch as the imposition of a probated sentence is within the discretion of the sentencing court, and the appellant did not have a substantial right to receive probation, much less to receive probation that could not be revoked in its entirety upon violation of a special condition of probation. *Walker v. Brown*, 281 Ga. 468, 639 S.E.2d 470 (2007).

No separation of powers violation. — Trial court's order revoking a probationer's probation did not violate the separation of powers doctrine under Ga. Const. 1983, Art. I, Sec. II, Para. III, as the probationer's release resulted from an administrative error, and there was no evidence of any executive department finding that the probationer had fully served an imposed sentence in confinement based on a good-time allowance or otherwise. *Clark v. State*, 287 Ga. App. 176, 651 S.E.2d 106 (2007).

No due process violation. — Notice given to a defendant that the defendant violated probation by committing robbery was sufficient notice that the defendant violated probation by committing the lesser included offense of theft by taking based on the same facts; under these circumstances, the defendant could not reasonably contend for due process purposes that the defendant was not aware of the grounds on which revocation was sought

or that the defendant's ability to prepare a defense was compromised. *Franklin v. State*, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

Probation revocation did not increase sentence. — As plaintiff had already served two years of plaintiff's probation, the motion to amend the probated sentence, which admittedly had a clerical error, prepared by defendant probation officer did not serve as an amendment to the length of the sentence imposed on the plaintiff. The grant of the order had the effect of revoking the probation provisions contained in the original sentence and requiring that the remainder of the sentence be served in confinement, but it could not, and did not, increase the length of the sentence. *Morgan v. Yarbrough*, No. 7:07-cv-45 (HL), 2008 U.S. Dist. LEXIS 35269 (M.D. Ga. Apr. 30, 2008).

Testimony from spouse during probation revocation hearing. — Two years of a probated sentence were properly revoked because the trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-23 (see now O.C.G.A. §§ 24-5-501 and 24-5-503) because the spouse was aware of the privilege but never asserted the privilege to the trial court, and it was assumed that the spouse waived the right not to testify. *Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

Remand for clarification of probation revocation. — In an action to revoke probation, remand was necessary because the written revocation orders stated that the trial court found that the defendant violated the conditions of probation by an unauthorized change of residence and failure to report to the defendant's probation officer as directed, reasons not charged in the state's petition and the appellate court could not ascertain the true basis for the revocation. *Dillard v. State*, 319 Ga. App. 299, 735 S.E.2d 297 (2012).

Revocation was proper but credit for time served was still due to defendant. — Trial court did not abuse the court's discretion by revoking the defendant's probation because the ambiguity in

General Considerations (Cont'd)

the form of the sentencing document was not fatal to the court's revocation since the defendant violated a rule prescribed by the court in failing to complete the drug treatment program the defendant had already begun; however, the trial court erred by failing to credit the defendant for 14 days for time served as outlined in the defendant's sentence when the court revoked the defendant's probation. *Floyd v. State*, 317 Ga. App. 619, 732 S.E.2d 527 (2012).

Impossibility for completion of special probationary condition. — Trial court erred in revoking the defendant's probationary sentence because insufficient evidence supported the court's finding that the defendant violated the terms of the defendant's probation by failing to attend a domestic violence intervention program; the sentence did not require the defendant to complete the domestic violence intervention program by any specific date, and no evidence was presented that it was even possible for the defendant to have completed such a program during the approximately three months that the defendant served on probation prior to being arrested for violating the terms of the defendant's probationary sentence. *Marks v. State*, 306 Ga. App. 824, 703 S.E.2d 379 (2010).

No date for completion of community service. — Insufficient evidence supported the trial court's findings that the defendant violated the terms of the defendant's probation by failing to complete any of the defendant's community service requirement because no evidence was presented that the defendant was ever directed to begin the defendant's community service on any specific date or at all. *Marks v. State*, 306 Ga. App. 824, 703 S.E.2d 379 (2010).

Cited in *Ledford v. State*, 189 Ga. App. 148, 375 S.E.2d 280 (1988); *Eubanks v. State*, 197 Ga. App. 731, 399 S.E.2d 290 (1990); *Mays v. State*, 200 Ga. App. 457, 408 S.E.2d 714 (1991); *Riggins v. State*, 206 Ga. App. 239, 424 S.E.2d 879 (1992); *Penaherrera v. State*, 211 Ga. App. 162, 438 S.E.2d 661 (1993); *Derrer v. Anthony*, 265 Ga. 892, 463 S.E.2d 690 (1995);

Ardeneaux v. State, 225 Ga. App. 461, 484 S.E.2d 74 (1997); *Griffin v. State*, 254 Ga. App. 848, 563 S.E.2d 916 (2002); *Kitchens v. State*, 234 Ga. App. 785, 508 S.E.2d 176 (1998); *Solomon v. State*, 237 Ga. App. 655, 516 S.E.2d 376 (1999); *Couch v. State*, 246 Ga. App. 106, 539 S.E.2d 609 (2000); *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001); *Griffin v. State*, 254 Ga. App. 848, 563 S.E.2d 916 (2002); *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Evidence Sufficient for Revocation

Violation of special condition. — When the violation of probation results solely from infraction of a special condition, not from commission of a felony offense, the revocation court is authorized by subsection (c) to revoke no more than the balance of defendant's probation. *Gearinger v. Lee*, 266 Ga. 167, 465 S.E.2d 440 (1996).

Trial court's reliance on O.C.G.A. § 42-8-34.1(c) to revoke four years of defendant's probation was appropriate; violation of any new special condition imposed in a previous revocation proceeding or any original condition reimposed therein was deemed to be a violation of a special condition imposed pursuant to the statute. *Bryant v. State*, 251 Ga. App. 108, 553 S.E.2d 629 (2001).

O.C.G.A. § 42-8-34.1(c) authorizes the revocation of the entirety of a probated sentence in those limited instances when the probationer has a prior revocation based on the violation of a special condition or when the special condition violated by the probationer consists of the failure to make court-ordered payments of restitution, reparation, costs, or fines. *Chatman v. Findley*, 274 Ga. 54, 548 S.E.2d 5 (2001), superseded by statute as stated in *Williams v. Ayers*, 276 Ga. 130, 577 S.E.2d 767 (2003).

Under O.C.G.A. § 42-8-34.1, a probated sentence cannot be revoked for more than two years unless the basis for revocation is either a new felony offense or a violation of a special condition of probation. Special condition of probation means a condition of a probated or suspended sentence which: (1) is expressly imposed as part of the sentence in addition to general condi-

tions of probation and court ordered fines and fees; and (2) is identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and requires the defendant to serve up to the balance of the sentence in confinement. *Gardner v. State*, 259 Ga. App. 375, 577 S.E.2d 69 (2003).

Defendant's original sentence for child molestation contained a virtually verbatim reproduction of the language required by O.C.G.A. § 42-8-34.1 to create a special condition of probation (that the defendant not associate with minors), and a modification order entered after the defendant's first probation violation did not suggest that the warnings contained in the original sentence were no longer applicable. Therefore, when the defendant violated the special condition of probation a second time, the sentencing court was justified under § 42-8-34.1 in requiring the defendant to serve the balance of the sentence in prison. *Jowers v. Washington*, 284 Ga. 478, 668 S.E.2d 703 (2008).

Trial court did not err in revoking probated sentence because the evidence was sufficient to convict the probationer of making a terroristic threat pursuant to O.C.G.A. § 16-11-37(a) in violation of the probationer's probation, and it was more than sufficient to justify the revocation of a portion of the probationer's probated sentence; the probationer's statement that he would shoot his wife in the head with his pistol would be sufficient to show that the probationer threatened his wife with a crime of violence with the purpose of terrorizing her, and the wife's testimony was corroborated despite the fact that she was the only one who heard the threats and despite the fact that she minimized their significance in her testimony. *Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

Sufficient evidence supported revocation of defendant's probation, which was imposed after a conviction for child molestation, because the defendant possessed a sexually explicit video and the defendant was in a relationship with a woman, who had a minor child, in violation of two of the special conditions of the defendant's probation. *Veats v. State*, 300 Ga. App. 600, 685 S.E.2d 416 (2009).

Because the defendant admitted that the defendant failed to make the required restitution payments, which were made a special condition of the defendant's probation, the trial court did not abuse the court's discretion in revoking the entire balance of the defendant's probation pursuant to O.C.G.A. § 42-8-34.1(e). *Polly v. State*, 323 Ga. App. 893, 748 S.E.2d 696 (2013).

Drug use while on probation. — Evidence was sufficient to show that the defendant violated the terms of the defendant's probation because at the probation revocation hearing, the defendant admitted that the defendant smoked marijuana while on probation and that the defendant failed to pay the fines associated with the original conviction for the sale of cocaine. *Simpson v. State*, 252 Ga. App. 1, 555 S.E.2d 247 (2001).

Evidence was sufficient to support revocation of the second defendant's probation as the state only had to prove by a preponderance of the evidence that the second defendant violated the terms of the second defendant's probation and the state proved that by showing that the second defendant possessed cocaine and by showing that the second defendant associated with disreputable characters, which it proved by establishing that the second defendant admitted the second defendant had associated with the first defendant. *Dugger v. State*, 260 Ga. App. 843, 581 S.E.2d 655 (2003).

Because the trial court did not err in: (1) admitting evidence of field tests done on the suspected methamphetamine found in a probationer's residence; (2) holding that the methamphetamine residue in a tin found in the probationer's dresser drawer supported a conclusion that the probationer's possession of the methamphetamine amounted to a violation of probation; and (3) admitting evidence showing the basis of the arrest warrant, despite a claim that the probationer was found to have not participated in a conspiracy to traffic methamphetamine, an order revoking the probationer's probation term was upheld. *Giang v. State*, 285 Ga. App. 491, 646 S.E.2d 710 (2007).

Trial court did not err in revoking probation on the ground that the probationer

Evidence Sufficient for Revocation (Cont'd)

committed the felony offense of possession of cocaine with intent to distribute because it was within the court's discretion to find that a sufficient foundation had been laid to allow an officer to state the officer's opinion that the substance found in the car in which the probationer was riding was cocaine when the officer testified that the officer had been a member of the narcotics investigation unit for five years, that the officer had received training in the visual identification of cocaine, and that the officer had personally worked over 200 cases where the officer had seized suspected cocaine, which subsequently tested positive for cocaine; the trial court did not manifestly abuse the court's discretion when the court found by a preponderance of the evidence that the substance was cocaine and that the probationer had constructive possession of the cocaine because in addition to the officer's opinion on the identity of the substance, the record contained other circumstantial evidence indicating that the substance was cocaine, and the driver of the car denied that the cocaine was the driver's and stated that the cocaine was thrown to the floorboard under the driver's feet by the probationer. *Thurmond v. State*, 304 Ga. App. 587, 696 S.E.2d 516 (2010).

Defendant's application for discretionary appeal was improvidently granted and the defendant's appeal was dismissed because, pursuant to O.C.G.A. § 42-8-34.1(b), the evidence was sufficient to show that the defendant violated the terms of the defendant's probation when marijuana and an open container of alcohol were found on the floorboard of a vehicle at the defendant's feet, and the defendant resisted arrest. *Killian v. State*, 315 Ga. App. 731, 728 S.E.2d 258 (2012).

Failure to pay restitution as probation violation. — Evidence was sufficient to support the trial court's decision to revoke the defendant's probation as a preponderance of the evidence showed that the defendant was in violation of the defendant's restitution obligation since the defendant admitted that the defendant was in arrears on that obligation,

and that the defendant committed a second violation of the defendant's probation by committing criminal acts on another person after the victim testified that the defendant struck the victim in the head and was among a group of men who beat and robbed the victim. *Cannon v. State*, 260 Ga. App. 15, 579 S.E.2d 60 (2003).

Trial court may revoke a probated sentence when the preponderance of the evidence shows that the defendant has committed the alleged violation of probation pursuant to O.C.G.A. § 42-8-34.1(a); thus, since the defendant's voluntary handwriting sample was properly admitted, the trial court did not consider an unreliable photo identification, and an expert was properly qualified, the evidence was sufficient to revoke the defendant's probation. *Poole v. State*, 270 Ga. App. 432, 606 S.E.2d 878 (2004).

Variance between dates in revocation petition and actual date. — Inadequacy of a probation revocation petition was not necessarily a basis for setting aside a revocation order if the factual grounds were established at the hearing; thus, a one-month variance between the date alleged in the petition and that proved at the hearing was not fatal. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Revocation of probation for criminal trespass and loitering. — Trial court was authorized to find, under the preponderance of the evidence standard, that the defendant's presence on private property caused a justifiable and reasonable alarm for the safety of the property, and the revocation of the defendant's probation was proper for the offense of criminal trespass and loitering or prowling when the record showed that the defendant climbed through a hole in a fence around private property at a time when the business was closed and the gate shut, where a manager called police, and where, when the defendant was told that police had been summoned, the defendant left the scene; there was no evidence that the defendant's economic status or homelessness factored into the trial court's decision to revoke defendant's probation. *Milanovich v. State*, 278 Ga. App. 669, 629 S.E.2d 556 (2006).

Possession of firearm by probationer. — Because the evidence showed that the probationer had continuous access to the firearms in the house on the day of a fatal shooting, and that the probationer intended to, and did in fact exercise control over the sons' access to one of the guns in the minutes leading up to the shooting, the trial court properly found that the probationer had constructive possession of the firearm. *Wright v. State*, 279 Ga. App. 299, 630 S.E.2d 774 (2006).

Obstruction of officer by probationer. — Although the evidence that the probationer made the probationer's arrest warrant unavailable to the officers was circumstantial, it was sufficient to authorize the trial court's finding, by a preponderance of the evidence, that the probationer obstructed the officers. *Carlson v. State*, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007).

Contact with minor by probationer. — Because sufficient evidence showed that the probationer approached a minor girl and offered that girl candy and admitted having incidental contact with minors, when these actions were explicitly prohibited as a condition of the probationer's probation, once the probationer reported this contact and the victim of that contact corroborated the report, the court did not abuse the court's discretion in revoking the probationer's probation term. *Mullens v. State*, 289 Ga. App. 872, 658 S.E.2d 421 (2008).

Evidence Insufficient for Revocation

Theft by receiving insufficient for probation revocation. — Revocation of defendant's probation based on theft by receiving was clearly erroneous as a stolen vehicle was seen at the defendant's home and later found in a yard next door to the defendant's home, but there was no evidence that defendant was ever in possession or control of the vehicle, which was a necessary element of theft by receiving. *Gonzales v. State*, 276 Ga. App. 11, 622 S.E.2d 401 (2005).

Revocation based on unpaid fine erroneous. — Trial court erred in revoking the defendant's probation based, in part, upon the court's finding that the

defendant violated the condition of probation that required the defendant to pay a fine because the record did not reflect that on or before the date of the revocation order that any balance was due. *Orr v. State*, 318 Ga. App. 77, 733 S.E.2d 378 (2012).

Failure to pay fines and fees. — Trial court committed reversible error in revoking the defendant's probation for failure to pay court-ordered fines and fees because the trial court made the court's determination without making the findings the United States Supreme Court required in revocation proceedings for failure to pay a fine or restitution, but rather, the trial court inquired only as to the defendant's fitness to work before deciding to revoke the defendant's probation; in order to revoke the defendant's probation based solely on the failure to pay those costs, the trial court was required to make a finding as to the defendant's wilfulness, and if the court concluded that the defendant was not at fault, the trial court was required to consider other punishment alternatives, which the court did not do. *Johnson v. State*, 307 Ga. App. 570, 707 S.E.2d 373 (2011).

Violation of special condition. — Since the conditions of defendant's probation did not include payment of restitution, costs, or fines, and were imposed by the original sentencing court, the balance of the probation was erroneously revoked under former O.C.G.A. § 42-8-34.1(c). *Williams v. Ayers*, 276 Ga. 130, 577 S.E.2d 767 (2003) (decided prior to deletion of phrase "imposed pursuant to this Code section").

Insufficient drug evidence for probation revocation. — Where defendant's mother was also a previously convicted drug violator; the cocaine and money were in defendant's mother's possession; nothing was found on defendant's person; and during the period of time in which the house was under surveillance, the defendant had not been seen entering or leaving the house, this evidence did not establish by a preponderance of the evidence that the defendant violated the defendant's probation by possessing cocaine with intent to distribute. *Anderson v. State*, 212 Ga. App. 329, 442 S.E.2d 268 (1994).

Evidence Insufficient for Revocation (Cont'd)

That a defendant's criminal conviction for trafficking in cocaine was reversed on appeal did not mean that revoking the defendant's probation on the basis of the same trafficking offense was automatically error; the criminal prosecution and the revocation proceeding were separate matters. The validity of the probation revocation was reviewed only in light of the evidence adduced at the revocation hearing. Defendant's probation was improperly revoked because the defendant's alleged trafficking in cocaine had not been established by a preponderance of the evidence as required by O.C.G.A. § 42-8-34.1(b). An informant's hearsay statements were not competent to show the defendant arranged a drug sale and no evidence connected the defendant with cocaine found in a house. *Brown v. State*, 294 Ga. App. 1, 668 S.E.2d 490 (2008).

Evidence did not support the revocation of the defendant's probation pursuant to O.C.G.A. § 42-8-34.1(b) since, after objections to hearsay evidence were sustained, the evidence did not support a finding that the defendant sold cocaine and marijuana; the only admissible evidence showed that the defendant took something out of a pocket and gave it to two men in exchange for money, and then the two men were taken into custody and found to have cocaine and marijuana in their possession. *Wright v. State*, 297 Ga. App. 813, 678 S.E.2d 506 (2009).

Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally likely that the pills belonged to the driver of the truck where the pills were found. *Scott v. State*, 305 Ga. App. 596, 699 S.E.2d 894 (2010).

Trial court erred in revoking the defendant's probation because the evidence was

insufficient to support the court's finding that the defendant committed the new offense of possession of less than one ounce of marijuana since the state presented no evidence other than the defendant's mere spatial proximity to the marijuana to support a finding that the defendant had the intent to exercise dominion and control over the marijuana. *Smith v. State*, 306 Ga. App. 54, 701 S.E.2d 490 (2010).

Trial court manifestly abused the court's discretion by granting the state's petition to revoke probation because the evidence was insufficient to support a finding that the probationer possessed marijuana with intent to distribute; the state showed only that the probationer was at the open front door of a trailer and that a sandwich bag of marijuana was found in a closed container inside a closet in a bedroom, but the evidence showed that other individuals had access to the trailer, including a man who sold drugs to a confidential informant. *Gray v. State*, 313 Ga. App. 470, 722 S.E.2d 98 (2011).

Revocation of probation was reversed because the circumstantial evidence was insufficient to show the defendant's constructive possession of the contraband found. Defendant neither owned nor leased any portion of the property and there was no evidence that the defendant lived on or controlled any of the premises. *White v. State*, 318 Ga. App. 581, 734 S.E.2d 421 (2012).

Leaving treatment program and failing to report to probation officer did not constitute felony escape. — For purposes of probation revocation, a defendant had not committed a new felony offense, escape under O.C.G.A. § 16-10-52, by leaving a drug and alcohol treatment program and by failing to report to a probation officer; the defendant was not then in lawful custody or in a residential facility operated by the Georgia Department of Corrections. *Chester v. State*, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

Probationer dismissed from drug treatment program insufficient grounds for revocation. — Trial court manifestly abused the court's discretion by granting the state's petition to revoke

probation because the evidence was insufficient to find that the probationer's discharge from a day center program was the result of any voluntary or willful conduct on the probationer's part; the probationer's own actions did not cause the probationer to be dismissed from the drug treatment program. *Gray v. State*, 313 Ga. App. 470, 722 S.E.2d 98 (2011).

Violation of work release program not proven for probation revocation.

— Trial court abused the court's discretion by revoking a defendant's probation because the state failed to prove that the conduct that formed the basis of the court's revocation order was expressly forbidden by any terms of the work-release program. Specifically, the allegation that the defendant "violated a court ordered work release program" was insufficient to satisfy due process, and the state failed to offer any evidence that the defendant was informed of the rules of the work-release program. *Legere v. State*, 299 Ga. App. 640, 683 S.E.2d 155 (2009).

Violation not established by preponderance of the evidence. — Evidence presented during hearing held to determine if defendant's probation should be revoked did not show that defendant did not intend to fulfill the terms of defendant's agreement to locate a car for a buyer, or that defendant had a fraudulent intent when defendant wrote a post-dated check that was dishonored when the buyer presented it for payment; the appellate court reversed the trial court's judgment finding that defendant committed theft by deception and revoking defendant's probation. *Young v. State*, 265 Ga. App. 425, 594 S.E.2d 667 (2004).

Because the evidence was insufficient, under a preponderance of the evidence standard, to find that defendant committed the offense of burglary, O.C.G.A. § 16-7-1, the trial court manifestly abused the court's discretion by revoking the probation. *Parker v. State*, 275 Ga. App. 35, 619 S.E.2d 750 (2005).

Insufficient evidence of victim for probation of revocation. — Trial court erred in revoking the defendant's probationary sentence because the evidence was insufficient to find that the defendant violated the condition of probation that

the defendant have no contact with the victim; no evidence was presented suggesting that the defendant authored untrue statements about the victim, which were posted on several websites, in order to get in touch with or communicate with the victim. *Marks v. State*, 306 Ga. App. 824, 703 S.E.2d 379 (2010).

Insufficient weapon possession evidence for probation revocation.

— Trial court erred in revoking the defendant's probation on the ground that the defendant violated a condition of the probation by possessing a firearm because the state did not carry the state's burden of showing that the defendant was in possession of the rifle found leaning against the front porch of the defendant's trailer since the probation officer acknowledged that the rifle could have belonged to any one of the defendant's neighbors; there must be something more than mere spatial proximity that links the probationer to the prohibited item. *Boatner v. State*, 312 Ga. App. 147, 717 S.E.2d 727 (2011).

Trial court erred in revoking the defendant's probation on the ground that the defendant violated a condition of the probation because the evidence was insufficient to support a finding that the defendant possessed a stun gun and other items found in a truck the defendant had been seen driving; the truck belonged to the defendant's brother-in-law, and there was no evidence that the defendant owned the truck, had exclusive control over the truck, or drove the truck prior to the discovery of the stun gun. *Boatner v. State*, 312 Ga. App. 147, 717 S.E.2d 727 (2011).

Insufficient evidence of assault to justify probation revocation.

— Trial court erred in revoking probation pursuant to O.C.G.A. § 42-8-34.1 on the ground that the probationer committed an aggravated assault in violation of O.C.G.A. § 16-5-21 because there was insufficient evidence that the probationer committed an aggravated assault offense; there was no evidence supporting an aggravated assault based on an alleged victim's apprehension of injury because even assuming that the probationer's collision with another vehicle while evading an officer was

Evidence Insufficient for Revocation (Cont'd)

the basis for the aggravated assault charge, there was no evidence as to the

occupant's apprehension of receiving an injury or as to his or her conduct showing the injury. *Klicka v. State*, 315 Ga. App. 635, 727 S.E.2d 248 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Violation of diversion center regulations. — If the conditions of probation include a requirement that the probationer obey the rules and regulations of a diversion center, up to six months of probation time may be revoked under subsection (b) of O.C.G.A. § 42-8-34.1 if the probationer violates those rules and regulations. 1988 Op. Att'y Gen. No. U88-16.

"Two year" provision of subsection (b) of O.C.G.A. § 42-8-34.1 would not apply to probation violations committed by persons assigned to a diversion center as a

part of a probated sentence. 1988 Op. Att'y Gen. No. U88-16.

Confinement of misdemeanants. — While misdemeanants may only be referred to probation centers upon initial sentencing pursuant to O.C.G.A. § 42-8-35.4, misdemeanants may also be referred to such facilities pursuant to probation revocation proceedings under O.C.G.A. § 42-8-34.1 and after a probation revocation proceeding pursuant to O.C.G.A. § 17-10-1(a)(3)(A). 1999 Op. Att'y Gen. No. 99-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 488, 531, 535, 536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Who may institute proceedings to revoke probation, 21 ALR5th 275.

Right and sufficiency of allocation in probation revocation proceeding, 70 ALR5th 533.

42-8-34.2. Delinquency of defendant in payment of fines, costs, or restitution or reparation; costs of garnishment.

(a) In the event that a defendant is delinquent in the payment of fines, costs, or restitution or reparation, as was ordered by the court as a condition of probation, the defendant's probation officer is authorized, but not required, to execute a sworn affidavit wherein the amount of arrearage is set out. In addition, the affidavit shall contain a succinct statement as to what efforts the department has made in trying to collect the delinquent amount. The affidavit shall then be submitted to the sentencing court for approval. Upon signature and approval of the court, said arrearage shall then be collectable through issuance of a writ of fieri facias by the clerk of the sentencing court; and the department may enforce such collection through any judicial or other process or procedure which may be used by the holder of a writ of execution arising from a civil action.

(b) This Code section provides the state with remedies in addition to all other remedies provided for by law; and nothing in this Code section shall preclude the use of any other or additional remedy in any case.

(c) No clerk of any court shall be authorized to require any deposit of cost or any other filing or service fee as a condition to the filing of a garnishment action or other action or proceeding authorized under this Code section. In any such action or proceeding, however, the clerk of the court in which the action is filed shall deduct and retain all proper court costs from any funds paid into the treasury of the court, prior to any other disbursement of such funds so paid into court. (Code 1981, § 42-8-34.2, enacted by Ga. L. 1990, p. 1331, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1991, p. 1051, § 1.)

Editor's notes. — Ga. L. 1990, p. 1331, § 2, not codified by the General Assembly, provides that this Code section shall apply with respect to sentences entered prior to July 1, 1990, as well as sentences entered on or after July 1, 1990.

42-8-35. Terms and conditions of probation; supervision.

(a) The court shall determine the terms and conditions of probation and may provide that the probationer shall:

- (1) Avoid injurious and vicious habits;
- (2) Avoid persons or places of disreputable or harmful character;
- (3) Report to the probation supervisor as directed;

(4) Permit the supervisor to visit the probationer at the probationer's home or elsewhere;

(5) Work faithfully at suitable employment insofar as may be possible;

(6) Remain within a specified location; provided, however, that the court shall not banish a probationer to any area within the state:

(A) That does not consist of at least one entire judicial circuit as described by Code Section 15-6-1; or

(B) In which any service or program in which the probationer must participate as a condition of probation is not available;

(7) Make reparation or restitution to any aggrieved person for the damage or loss caused by the probationer's offense, in an amount to be determined by the court. Unless otherwise provided by law, no reparation or restitution to any aggrieved person for the damage or loss caused by the probationer's offense shall be made if the amount is in dispute unless the same has been adjudicated;

(8) Make reparation or restitution as reimbursement to a municipality or county for the payment for medical care furnished the person while incarcerated pursuant to the provisions of Article 3 of Chapter 4 of this title. No reparation or restitution to a local

governmental unit for the provision of medical care shall be made if the amount is in dispute unless the same has been adjudicated;

(9) Repay the costs incurred by any municipality or county for wrongful actions by an inmate covered under the provisions of paragraph (1) of subsection (a) of Code Section 42-4-71;

(10) Support the probationer's legal dependents to the best of the probationer's ability;

(11) Violate no local, state, or federal laws and be of general good behavior;

(12) If permitted to move or travel to another state, agree to waive extradition from any jurisdiction where the probationer may be found and not contest any effort by any jurisdiction to return the probationer to this state;

(13) Submit to evaluations and testing relating to rehabilitation and participate in and successfully complete rehabilitative programming as directed by the department;

(14) Wear a device capable of tracking the location of the probationer by means including electronic surveillance or global positioning satellite systems. The department shall assess and collect fees from the probationer for such monitoring at levels set by regulation by the department;

(15) Complete a residential or nonresidential program for substance abuse or mental health treatment as indicated by a risk and needs assessment;

(16) Agree to the imposition of graduated sanctions when, in the discretion of the probation supervisor, the probationer's behavior warrants a graduated sanction; and

(17) Pay for the cost of drug screening. The Department of Corrections shall assess and collect fees from the probationer for such screening at levels set by regulation of the Department of Corrections.

(b) In determining the terms and conditions of probation for a probationer who has been convicted of a criminal offense against a victim who is a minor or dangerous sexual offense as those terms are defined in Code Section 42-1-12, the court may provide that the probationer shall be:

(1) Prohibited from entering or remaining present at a victim's school, place of employment, place of residence, or other specified place at times when a victim is present or from loitering in areas where minors congregate, child care facilities, churches, or schools as those terms are defined in Code Section 42-1-12;

(2) Required, either in person or through remote monitoring, to allow viewing and recording of the probationer's incoming and outgoing e-mail, history of websites visited and content accessed, and other Internet based communication;

(3) Required to have periodic unannounced inspections of the contents of the probationer's computer or any other device with Internet access, including the retrieval and copying of all data from the computer or device and any internal or external storage or portable media and the removal of such information, computer, device, or medium; and

(4) Prohibited from seeking election to a local board of education.

(c) The supervision provided for under subsection (b) of this Code section shall be conducted by a probation officer, law enforcement officer, or computer information technology specialist working under the supervision of a probation officer or law enforcement agency. (Ga. L. 1956, p. 27, § 10; Ga. L. 1958, p. 15, § 11A; Ga. L. 1965, p. 413, § 3; Ga. L. 1992, p. 2125, § 4; Ga. L. 1992, p. 2942, § 2; Ga. L. 2004, p. 761, § 3; Ga. L. 2004, p. 775, § 4; Ga. L. 2006, p. 379, § 25/HB 1059; Ga. L. 2006, p. 425, § 1/HB 692; Ga. L. 2008, p. 810, § 5/SB 474; Ga. L. 2012, p. 899, § 7-8/HB 1176; Ga. L. 2013, p. 222, § 18/HB 349.)

The 2012 amendment, effective July 1, 2012, in subsection (a), deleted "and" at the end of paragraph (a)(12), substituted a semicolon for a period at the end of paragraph (a)(13), and added paragraphs (a)(14) through (a)(16); and, in subsection (b), deleted former paragraph (b)(2), which read: "Required to wear a device capable of tracking the location of the probationer by means including electronic surveillance or global positioning systems. The department shall assess and collect fees from the probationer for such monitoring at levels set by regulation by the department;" redesignated former paragraphs (b)(3) through (b)(5) as present paragraphs (b)(2) through (b)(4), respectively, and inserted a comma following "Internet access" in paragraph (b)(3). See editor's note for applicability.

The 2013 amendment, effective July 1, 2013, deleted "and" at the end of paragraph (a)(15); substituted "; and" for a period at the end of paragraph (a)(16); and added paragraph (a)(17). See editor's note for applicability.

Cross references. — Prohibition against possession of firearms by convicted felons, § 16-11-131. Payment of

fine as condition to probation for felony conviction, § 17-10-8.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, paragraph (8), as added by Ga. L. 1992, p. 2942, was redesignated as paragraph (b)(9) and the following paragraphs were redesignated accordingly, and "42-4-71" was substituted for "42-4-51" in present paragraph (b)(9).

Editor's notes. — Ga. L. 2004, p. 761, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that the safety of the public is a paramount concern and that prison and jail overcrowding and the high cost of incarceration demand a cost effective and innovative approach to protecting communities from dangerous offenders while at the same time providing alternatives to, or bridges to and from incarceration. Under appropriate conditions and limitations, electronic monitoring devices provide the criminal justice system with a tool that should be considered under proper circumstances. Electronic monitoring devices offer effective means to track individuals and may reduce criminal recidivism as well as provide the state with monetary savings since the cost of an

electronic monitoring device is far less than the cost of incarcerating an individual and an individual may be able to pay for the device. The criminal penalties provided by this Act are designed to encourage the use of electronic monitoring devices while at the same time discourage interference with these devices.”

Ga. L. 2006, p. 379, § 30/HB 1059, not codified by the General Assembly, provides, in part, that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent

conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.”

Law reviews. — For article, “A Review of Georgia’s Probation Laws,” see 6 Ga. St. B.J. 255 (1970). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article, “Appeal and Error: Appeal or Certiorari by State in Criminal Cases,” see 30 Ga. St. U.L. Rev. 17 (2013).

For note, “Limitations Upon Trial Court Discretion in Imposing Conditions of Probation,” see 8 Ga. L. Rev. 466 (1974). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992). For note, “‘158-County Banishment’ in Georgia: Constitutional Implications under the State Constitution and the Federal Right to Travel,” see 36 Ga. L. Rev. 1083 (2002).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROBATION TERMS AND CONDITIONS

1. IN GENERAL
2. AVOID INJURIOUS AND VICIOUS HABITS
3. CONFINEMENT TO SPECIFIED LOCATION
4. REPARATION OR RESTITUTION

REVOCATION OF PROBATION

1. IN GENERAL
2. PROCEDURAL REQUIREMENTS
3. VIOLATION OF RULES OR REGULATIONS

General Consideration

Editor’s notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, §§ 27-2702 and 27-2705 are included in the annotations for this Code section.

Warrantless searches vs. warrantless arrests. — Trial court erred in denying a probationer’s motion to suppress the

evidence seized from the probationer’s apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence was seized without a warrant after the probationer was not found in the apartment and had to be excluded under the Fourth Amendment as the search conducted was only

permissible insofar as the search involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer's arrest. The probationer was never placed on notice that the probationer was going to be subjected to warrantless searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. *Jones v. State*, 282 Ga. 784, 653 S.E.2d 456 (2007).

Cited in *Reynolds v. State*, 101 Ga. App. 715, 115 S.E.2d 214 (1960); *O'Quinn v. State*, 121 Ga. App. 231, 173 S.E.2d 409 (1970); *Raines v. State*, 130 Ga. App. 1, 202 S.E.2d 253 (1973); *State v. Collett*, 232 Ga. 668, 208 S.E.2d 472 (1974); *P.R. v. State*, 133 Ga. App. 346, 210 S.E.2d 839 (1974); *Gilbert v. State*, 137 Ga. App. 754, 225 S.E.2d 86 (1976); *Bennett v. State*, 141 Ga. App. 795, 234 S.E.2d 327 (1977); *Eubanks v. State*, 144 Ga. App. 152, 241 S.E.2d 6 (1977); *Smith v. State*, 148 Ga. App. 634, 252 S.E.2d 62 (1979); *Allen v. State*, 150 Ga. App. 109, 257 S.E.2d 5 (1979); *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980); *Cannon v. State*, 246 Ga. 754, 272 S.E.2d 709 (1980); *Johnson v. State*, 162 Ga. App. 226, 291 S.E.2d 94 (1982); *Malcom v. State*, 162 Ga. App. 587, 291 S.E.2d 756 (1982); *In re J.C.*, 163 Ga. App. 822, 296 S.E.2d 117 (1982); *Shaw v. State*, 164 Ga. App. 208, 296 S.E.2d 765 (1982); *Smith v. State*, 164 Ga. App. 384, 297 S.E.2d 738 (1982); *Davis v. State*, 172 Ga. App. 787, 324 S.E.2d 767 (1984); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Wilson v. State*, 188 Ga. App. 731, 374 S.E.2d 345 (1988); *Burke v. State*, 201 Ga. App. 50, 410 S.E.2d 164 (1991); *Anderson v. State*, 226 Ga. App. 286, 486 S.E.2d 410 (1997); *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998); *Sanchez v. State*, 234 Ga. App. 809, 508 S.E.2d 185 (1998).

Probation Terms and Conditions

1. In General

Authority of court to set terms and conditions. — This section is not exclusive in its provisions, but places upon the court authority to set terms of probation and thereafter lists certain conditions which the court may impose if the court

sees fit. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959); *Gay v. State*, 101 Ga. App. 225, 113 S.E.2d 223 (1960); *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970); *Marshall v. State*, 127 Ga. App. 805, 195 S.E.2d 469 (1972); *Geiger v. State*, 140 Ga. App. 800, 232 S.E.2d 109 (1976).

Trial judge is not limited to imposition of only those restrictions enumerated in this section. *Clackler v. State*, 130 Ga. App. 738, 204 S.E.2d 472 (1974); *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980); *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

This section permits the court to determine the terms and conditions of probation, and lists ten conditions of probation. *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

Absent inclusion of a record and an express authority to the contrary, the trial judge was authorized to impose attendance at the Chatham County DUI court treatment program as a condition of the defendant's probation; further, imposition was not a denial of the defendant's equal protection rights in that nonresidents were not required to attend, especially and in light of the fact that the defendant failed to show any evidence to show the genesis, nature, or content of the program of which the defendant complained. *Kellam v. State*, 271 Ga. App. 125, 608 S.E.2d 729 (2004).

While the Court of Appeals agreed with the defendant that the cited probation conditions were peculiar to a DUI conviction, because the defendant failed to cite any authority showing that a court abused the court's discretion in imposing the condition's upon a probated sentence for serious injury by vehicle, when DUI was the predicate offense, and the defendant failed to show that any such condition was unreasonable or failed to serve the main goals of probation, the appeals court saw no reason why the cited conditions could not be imposed upon a probated sentence for serious injury by vehicle. *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

In overruling the defendant's objection to the probation imposed, the trial court erroneously deferred to the probation de-

Probation Terms and Conditions (Cont'd)
1. In General (Cont'd)

partment in stating that any invalid conditions could be removed by the probation department; the appeals court disapproved of such a practice as O.C.G.A. § 42-8-35(a) provided that only the court was to determine the terms and conditions of probation. *Grovenstein v. State*, 282 Ga. App. 109, 637 S.E.2d 821 (2006).

Special probation conditions, requiring that the defendant complete a driving under the influence risk reduction course under O.C.G.A. § 40-6-391(c), perform 40 hours of community service under O.C.G.A. § 40-6-391(c), and pay a \$25 photograph fee under O.C.G.A. § 40-6-391(j)(1), (2), were not an abuse of discretion despite the fact that the conditions of probation were not imposed upon the defendant's driving under the influence conviction, for which probation was not imposed, but were instead imposed on the defendant's sentence of probation on the related convictions; while the defendant claimed that the conditions were peculiar to a driving under the influence conviction, the conditions were reasonably related to the nature of the offenses and the rehabilitative goals of probation pursuant to O.C.G.A. § 42-8-35. *Johnson v. State*, 282 Ga. App. 258, 638 S.E.2d 406 (2006).

Constitutionality of polygraph test requirement. — Condition requiring probationer to submit to polygraph tests does not violate the defendants' Fifth Amendment rights, and the condition may be imposed, in the discretion of the trial judge, with no more than a general finding of the court that it is reasonably necessary to accomplish the purpose of probation. *Mann v. State*, 154 Ga. App. 677, 269 S.E.2d 863 (1980).

Confinement not "incarceration." — Sentence of defendant based on first offender treatment, to five years' probation, conditioned upon successive periods of confinement in a detention center, a diversion center, and in defendant's house under intensive supervision, was authorized and did not constitute "incarceration," which refers to continuous and uninter-

rupted custody in a jail or penitentiary. *Penaherrera v. State*, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

Condition precluding contact between perpetrator of sexual crime and victim. — Imposition as a condition of probation that the defendant who was convicted of aggravated child molestation have no direct or indirect contact with the defendant's seven-year-old daughter until she reached the age of majority was within the discretion of the court, and was not a violation of the defendant's constitutional rights. *Tuttle v. State*, 215 Ga. App. 396, 450 S.E.2d 863 (1994).

Condition of probation that defendant live with parents during course of probated sentences implicitly imposes restriction on defendant's parents, i.e., that the parents maintain a domicile for the defendant, and is unenforceable. *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981).

Suspension of defendant's hunting and fishing privileges during the probation period imposed upon conviction of a violation of O.C.G.A. § 27-3-9, unlawful enticement of game, was not an abuse of discretion. *Quintrell v. State*, 231 Ga. App. 268, 499 S.E.2d 117 (1998).

Condition that defendant wear special bracelet. — List in O.C.G.A. § 42-8-35 of conditions which may be imposed is not exclusive and the court had authority to impose the requirement that the defendant wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT." *Ballenger v. State*, 210 Ga. App. 627, 436 S.E.2d 793 (1993).

Condition requiring child support payments. — Condition requiring that the probationer make child support payments directly to his ex-wife was not unreasonable and served a legitimate purpose. *Darby v. State*, 230 Ga. App. 32, 495 S.E.2d 146 (1998).

Condition requiring curfew. — Probation condition stating that "Defendant will submit a schedule of weekly activities to the probation officer and will be subject to curfews at the officer's discretion" was not improper. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Danger to probationer. — Court would reverse a sentence which required the defendant, as a condition of probation, to wear a placard stating “BEWARE HIGH CRIME AREA” for a certain number of hours while walking through the area where the defendant committed the defendant’s offense since the sign itself indicated that the defendant would be patrolling in a high crime area and, therefore, this would result in the defendant being placed in danger. *Williams v. State*, 234 Ga. App. 37, 505 S.E.2d 816 (1998).

Incarceration not impossible as condition for probation. — In the absence of express statutory authority recognizing continuous and uninterrupted incarceration in a jail or penitentiary as a viable condition of probation, the imposition of any term of continuous and uninterrupted incarceration in a jail or penitentiary as a special condition of probation is unauthorized by law. *Pitts v. State*, 206 Ga. App. 635, 426 S.E.2d 257 (1992).

Condition for sex offenders imposed. — Trial court was authorized to conclude that the defendant’s conduct of secretly videotaping the defendant’s stepdaughter while she was in the nude was by its nature a sexual offense against a minor or criminal sexual conduct toward a minor. The court, therefore, did not err in exercising the court’s broad discretion to impose upon the defendant special conditions of probation for sex offenders. *Price v. State*, 320 Ga. App. 85, 738 S.E.2d 289 (2013).

2. Avoid Injurious and Vicious Habits

Prohibition against alcohol consumption. — Prohibition against consumption of alcohol as condition of probation is authorized by paragraph (1) of this section. An alcoholic is not exempt from such a condition. *Mock v. State*, 156 Ga. App. 763, 275 S.E.2d 393 (1980).

Condition against engaging in profession for certain period. — Condition that defendant not engage in practice of law for a period of one year was within the sound discretion of the court in probating the sentence, and was authorized under former Code 1933, § 27-2702 and Ga. L. 1965, p. 413, § 3 (see now O.C.G.A.

§§ 42-8-34 and 42-8-35). *Yarbrough v. State*, 119 Ga. App. 46, 166 S.E.2d 35 (1969).

3. Confinement to Specified Location

Diversion center. — Probationer is not subject to prosecution for the felony offense of escape, after the probationer fails to return to a diversion center from which the probationer is given permission to leave. *Chandler v. State*, 257 Ga. 775, 364 S.E.2d 273 (1988).

Banishment. — Banishment of one convicted of crime from county or counties may be a reasonable condition of probation. *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

No section or other authority grants jurisdiction to trial court to banish a person other than the convicted criminal as a condition of the criminal’s probation. *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

Habeas court properly denied the defendant’s petition for habeas relief based on the contention that a condition of probation banishing the defendant from every county in the State of Georgia but one was unconstitutional as the defendant failed to show that the probation condition to remain in Toombs County only was unreasonable or otherwise failed to bear a logical relationship to the rehabilitative scheme of the sentence pronounced. The Supreme Court of Georgia noted that the banishment was justified to protect the victim, the defendant’s ex-spouse, from the defendant’s propensity for violence toward the victim. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

Trial court did not err in modifying the probationary portion of the defendant’s sentence by imposing a condition banishing the defendant from the subdivision in which the defendant committed burglaries because the trial court’s original sentencing order included as a special condition of probation that the defendant was to avoid all contact with the burglary victims, each of whom lived in the subdivision at issue, and to the extent that the modified sentence simply clarified the scope of that special condition, it was

**Probation Terms and
Conditions (Cont'd)**
**3. Confinement to Specified
Location (Cont'd)**

contemplated within the terms of the original sentence pursuant to O.C.G.A. § 42-8-34(g); the banishment provision was reasonable, narrow in scope, and included only the subdivision in which the victims resided, and in the absence of a hearing transcript or any record evidence to the contrary, the court of appeals had to presume that the trial court properly considered the evidence before the court. *Tyson v. State*, 301 Ga. App. 295, 687 S.E.2d 284 (2009).

Threat of refusal to abide by banishment. — When the trial court imposes 20 year sentence with ten years thereof to be probated, conditional upon banishment of the defendant from the judicial circuit, threats by the defendant not to abide by probational banishment authorize the judge to impose a sentence of 20 years. *Garland v. State*, 160 Ga. App. 97, 286 S.E.2d 330 (1981).

4. Reparation or Restitution

Constitutionality of restitution condition. — Sentence on a conviction for a fraudulent disposition of crops subject to a landlord's lien under former Code 1933, § 61-9903 (see now O.C.G.A. § 44-14-348), which provided for probation in lieu of a prison sentence on the condition that the landlord was repaid, was a valid and legal sentence and was not violative of Ga. Const. 1945, Art. I, Sec. I, Para. XXI (see now Ga. Const. 1983, Art. I, Sec. I, Para. XXIII). *Davis v. State*, 53 Ga. App. 325, 185 S.E. 400 (1936) (decided under former law).

Probation may be conditioned upon payment of expenses in accordance with the conditions of probation. *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

Serving sentence outside detention center. — Court may probate sentence to permit convicted person to serve sentence outside confines of place of detention "on such conditions as it may see fit," and this

vests a broad power in the trial court, and restitution to an injured person or the person's property cannot be said to be a condition in violation of that power. *Henry v. State*, 77 Ga. App. 735, 49 S.E.2d 681 (1948).

Notice and hearing requirements. — Prior notice and an opportunity to be heard are prerequisite where restitution is ordered by court to be paid out of a probationer's weekly salary and the penalty for failure to pay is imprisonment. *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973).

Effect of fixing amount of restitution required to be paid under paragraph (a)(7) of this section, without notice to the probationer and without any opportunity for probationer to question or appeal amount, especially when criminal sanctions may be involved, violates the Fourteenth Amendment, since due process requires notice and an opportunity for a hearing appropriate to the nature of the case when the state seeks to deprive a person of property or liberty. *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973).

Contesting restitution condition. — Recourse for defendant who does not agree to amount of restitution ordered by trial court is to contest the issue at the time the condition is imposed. *Johnson v. State*, 156 Ga. App. 511, 274 S.E.2d 669 (1980); *Johnson v. State*, 157 Ga. App. 155, 276 S.E.2d 667 (1981).

Appellant's plea of guilty to accusation and execution of written acknowledgment of conditions of probation did not constitute an agreement to the value of stolen property for purposes of restitution. *Johnson v. State*, 156 Ga. App. 511, 274 S.E.2d 669 (1980).

When the appellant failed to dispute or contest amount of restitution ordered by the trial court, restitution was properly imposed without an adjudication. *Cobb v. State*, 162 Ga. App. 314, 291 S.E.2d 390 (1982); *Patrick v. State*, 184 Ga. App. 260, 361 S.E.2d 251 (1987).

Defendant is only entitled to adjudication of the restitutionary amount when that amount is in dispute. *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983); *Williams v. State*, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Since the defendant failed to dispute the amount of restitution ordered as a condition of probation for theft by taking, and the state failed to prove the amount at trial is of no consequence, because the state was only required to prove that the defendant stole in excess of \$200.00 (now \$500.00) under O.C.G.A. § 16-8-12(a)(1). *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983).

When the amount of medical expenses of a juvenile assault victim is undisputed based on the uncontradicted testimony of the victim in the disposition hearing, there is no error in ordering restitution. *C.P. v. State*, 167 Ga. App. 374, 306 S.E.2d 688 (1983).

When the defendant voiced no objection in the trial court to the interest charged as part of the amount of restitution, the defendant may not complain of it on appeal. *Corbin v. State*, 202 Ga. App. 464, 415 S.E.2d 14 (1992).

Restitution as condition. — While the defendant may not be sentenced to make restitution, the court may make restitution a condition of probation. *Biddy v. State*, 138 Ga. App. 4, 225 S.E.2d 448 (1976).

Determining nature of restitution order. — Elements of O.C.G.A. T. 17, Ch. 14 may be used to discern nature of order of restitution made under O.C.G.A. § 42-8-35. This can be done since under § 42-8-35 "restitution" was an authorized condition of probation and the enactment of T. 17, Ch. 14 "is merely a more detailed enactment regarding restitution." *Newton v. Fred Haley Poultry Farm*, 15 Bankr. 708 (Bankr. N.D. Ga. 1981).

Condition for restoration of driver's license. — Restitution of damages to other persons involved in an automobile accident may not be imposed as a condition for restoration of a driver's license in such cases when the amount is in dispute, unless the issue has been adjudicated because a party may be guilty of violating the traffic laws and be found not liable in a civil suit for damages. *Payne v. State*, 138 Ga. App. 358, 226 S.E.2d 152 (1976).

Restitution permissible despite scheduling obligation owed creditor. — Trial court is empowered to stipulate as a condition of probation that restitution

shall be made to the aggrieved party despite the defendant having scheduled the obligation owing the creditor in bankruptcy proceedings. *Marshall v. State*, 127 Ga. App. 805, 195 S.E.2d 469 (1972).

Restitution based on untried charge improper. — When there was no accusation or evidence relating to a particular theft, the trial court cannot order restitution for that theft as a condition of probation even if the court was aware of an untried charge relating to that theft. *Robinson v. State*, 169 Ga. App. 763, 315 S.E.2d 277 (1984).

Repayment of salary. — Trial court may, as a condition of probation, require repayment of the salary received by a county officer while the officer was suspended. *LaPann v. State*, 167 Ga. App. 288, 306 S.E.2d 373 (1983).

Reimbursement of costs of representation. — Georgia Indigent Defense Act, in replacing former O.C.G.A. § 17-12-10(c), did not preclude a trial court from ordering restitution of attorney fees as part of the court's general power to impose reasonable conditions of probation under O.C.G.A. § 42-8-35; thus, a defendant was properly ordered to reimburse the costs of the defendant's legal representation, and that aspect of the defendant's sentence was not a nullity. *State v. Pless*, 282 Ga. 58, 646 S.E.2d 202 (2007).

Restitution properly adjudicated. — See *Lee v. State*, 166 Ga. App. 485, 304 S.E.2d 446 (1983).

Revocation of Probation

1. In General

Revocation of purported probation sentence. — Sentences for criminal offenses should be certain, definite, and free from ambiguity, and, when the contrary is the case, the benefit of the doubt should be given to the accused. Hence, the trial court erred in revoking a purported probation sentence since construed as a whole, the sentence was an alternative one and the defendant was to be discharged upon payment of fines and costs. *Favors v. State*, 95 Ga. App. 318, 97 S.E.2d 613 (1957).

Service of sentence on probation as privilege. — Service of sentence on pro-

Revocation of Probation (Cont'd)

1. In General (Cont'd)

bation is conferred as privilege and cannot be demanded as a matter of right, but this does not mean that a defendant's liberty is something that can be the subject matter of whim or fancy of the trial judge. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951) (decided under former Code 1933, §§ 27-2702 and 27-2705 prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

2. Procedural Requirements

Authority of judge to suspend or probate sentence. — Judge imposing a sentence is granted power to suspend or probate the sentence under such rules and regulations as the judge thinks proper. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

Judge has the right and authority to revoke the suspension or probation, after notice and a hearing, when the defendant violates any of the rules and regulations prescribed by the court. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957) (decided under former Code 1933, §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

Notice or hearing required for sentence revocation. *Balkcom v. Gunn*, 206 Ga. 167, 56 S.E.2d 482 (1949) (decided under former Code 1933, T. 27, including §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

Sufficiency of notice. — Notice must be sufficient to inform the defendant of the manner in which the defendant has violated the defendant's parole and give the defendant an opportunity to defend. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Some evidence required for revocation of probation. — While the trial court has a wide discretion in revoking a probated sentence, and while only slight evidence will support a judgment of revocation, some evidence that the defendant violated the terms of the defendant's probated sentence as charged in the notice given the defendant of the revocation hearing is required. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959); *Gay*

v. State, 101 Ga. App. 225, 113 S.E.2d 223 (1960).

Evidence held insufficient. — Evidence was insufficient when notice contained in special order of arrest charged the defendant with manufacturing illicit whiskey, but no evidence was introduced; mere fact that the defendant was operating a truck loaded with sugar, and the defendant refused to give the name of the purchaser or seller of the sugar and had no bill of lading or bill of sale for the sugar, which facts were perfectly consistent with the defendant's contention that the defendant was doing some hauling, was of itself not sufficient to authorize revocation of the probation order. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

When notice contained in order of arrest failed to charge the defendant with violation of the provision of the probation order prohibiting the defendant from leaving the state without permission, mere fact that the defendant was stopped in Alabama was not sufficient ground for revocation thereof. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Matters to be considered in revoking probation. — Since the court cannot revoke a probated sentence unless the sentence has conditions sufficiently definite to be enforceable, and unless the conditions have not been complied with, and since the defendant is entitled to notice and an opportunity to be heard on the charge which is brought against the defendant, only those alleged violations which are terms of the original sentence, and notice of the violation of which has been given the probationer, may be considered by the court on the hearing to revoke the probated sentence. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

3. Violation of Rules or Regulations

Need for prescribed rules and regulations. — When no rules or regulations are prescribed in the alleged suspended or probated sentence, and no violation of a prescribed rule or regulation is alleged, the court is without authority to order the defendant incarcerated upon the theory that the defendant has violated the terms and conditions of a probation sentence.

Morgan v. Foster, 208 Ga. 630, 68 S.E.2d 583 (1952); *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957) (decided under former Code 1933, §§ 27-2702, 27-2705, and 27-2706, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

Probated sentences must show rules and regulations prescribed so that a violation of such rules and regulations will revoke probation. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957) (decided under former Code 1933, §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21); *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Discretion to impose non-specified restrictions. — Court has authority to impose restrictions not specifically listed in this section, and among them the restriction that the defendant shall not violate the penal laws of the state. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Strict construction. — Statutes providing for suspension of a sentence or probation of defendant must be strictly followed. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951) (decided under former Code 1933, §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

Language held not so vague as to be unenforceable. — Provision in a probation sentence that the "sentence is suspended on payment of fine and on the further condition that defendant not violate laws of this state, and until further order of this court," is not so vague, indefinite, ambiguous, and uncertain as to be unenforceable; the laws of this state being

fixed by statute and presumed to be within the knowledge of every competent person. *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954) (decided under former Code 1933, § 27-2705).

Probation sentence held unenforceable. — If the words, "maintain a correct life" are intended to impose any condition upon the defendant over and beyond compliance with the rules prescribed for the defendant's conduct by the court, the words are too vague, indefinite, and uncertain to be given any construction or application. *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952) (decided under former Code 1933, §§ 27-2705 and 27-2706, prior to revision by Ga. L. 1956, p. 27, § 21).

Condition applicable for probated sentence applies to suspended sentence. — Condition which would be authorized in the case of a probated sentence would be authorized in the case of a suspended sentence. *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970).

Releasing defendant without prescribing conditions or rules. — When no conditions or rules are prescribed by the court for the conduct of the defendant, the defendant's release at the direction of the court upon payment of a fine is not a suspended or probated sentence, but an unconditional discharge. The words, "until further order of the court," appearing in the sentence, are insufficient to constitute a suspended sentence or probation. *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952) (decided under former Code 1933, §§ 27-2705 and 27-2706 prior to revision by Ga. L. 1956, p. 27, § 21).

OPINIONS OF THE ATTORNEY GENERAL

Imposition of terms by board. — Board or the board's agents may not place on a prisoner in connection with the prisoner's probation any terms or conditions not required of the prisoner by court order passed by the trial judge at the conclusion of the hearing held for the purpose of considering the prisoner's probation. 1958-59 Op. Att'y Gen. p. 223.

Board, acting through the director of probation (now commissioner of corrections) and probation officers, is without

authority to require of probationers under the board's supervision the execution of any waiver of any right of extradition or otherwise, or to impose upon the probationers any condition not placed upon the probationers by the trial judge in the judge's probation order. 1958-59 Op. Att'y Gen. p. 223.

Screening for virus as probation condition. — Confidential screening for the HTLV-III/LAV virus in convicted prostitutes may be required: (1) as a health

measure by the Department of Human Resources; or (2) as a condition of probation by the sentencing court. 1986 Op. Att'y Gen. No. 86-19.

Imposition of fine payment. — Superior court judge may impose payment of a fine as a term and condition of probation for a defendant being treated under Ga. L. 1968, p. 324, § 1 (see now O.C.G.A. § 42-8-60 et seq.). 1975 Op. Att'y Gen. No. U75-42.

Banishment as condition. — Supreme Court of this state has upheld a trial court's authority to impose banishment as a condition of probation. 1979 Op. Att'y Gen. No. U79-8.

List not exclusive. — List of conditions of probation in this section is not exclusive. 1979 Op. Att'y Gen. No. U79-8.

Community service as condition. — Probated sentence providing for specified community service as a condition of probation is permissible. 1979 Op. Att'y Gen. No. U79-8.

Probationer contributing for probation supervisors' insurance. — Probationer can be required to pay by court order, as a condition of his/her probation, a reasonable amount toward the cost of maintaining insurance to protect probation supervisors from personal liability should probationers be injured while performing court-ordered community service. 1983 Op. Att'y Gen. No. 83-18.

Covenant not to sue probation supervisors. — Probationer may be required to enter into covenant not to sue probation supervisors personally. A sentencing court may, in the court's discretion, require a probationer to enter into, as a condition of probation, a covenant not to sue probation supervisors in their personal capacity if the probationer is injured while performing court-ordered community service work. 1983 Op. Att'y Gen. No. 83-18.

Reasonable supervision fee as condition. — Probationer's agreement to pay

supervision fee should be obtained at time of sentencing and should be recorded. But, regardless of whether the probationer agrees, the probationer can be required to pay the reasonable supervision fee as a condition of probation. 1981 Op. Att'y Gen. No. 81-100.

Statutory conditions in O.C.G.A. § 42-8-35 are not exclusive, and trial courts may, as a condition of probation, impose a probation supervision fee. 1985 Op. Att'y Gen. No. U85-4.

Collection of supervision fees by Department. — Department of Offender Rehabilitation (Corrections) may not on its own initiative collect a supervision fee from probationers. 1981 Op. Att'y Gen. No. 81-100.

Withholding "collection fee" from fines to offset costs. — Probation supervision fee collected pursuant to probation order of sentencing court does not have a statutory premise. Therefore, such a fee does not have to be paid into state treasury but, if permitted by probation order, could be retained by the Department of Offender Rehabilitation (Corrections). 1981 Op. Att'y Gen. No. 81-100.

Use of restitution funds. — Pursuant to this section, funds collected for the purpose of restitution may be used only for that purpose. 1971 Op. Att'y Gen. No. 71-182.

Returning funds to probationer. — When a trust of funds collected pursuant to this section fails of accomplishment, the funds should be returned to the probationer who is similar to the grantor of an implied or resulting trust. Op. Att'y Gen. No. 71-182.

Return of small fund amount when probationer not found. — When neither the intended recipient nor the probationer can be found, and the sum collected pursuant to this section is quite small, the money should continue to be held since the escheat procedure would consume the fund. 1971 Op. Att'y Gen. No. 71-182.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

C.J.S. — 24 C.J.S., Criminal Law,

§§ 2144-2161.

ALR. — Power to impose sentence with direction that after defendant shall have

served part of time he be placed on probation for the remainder of term, 147 ALR 656.

Propriety of conditioning probation or suspended sentence on defendant's refraining from political activity, protest, or the like, 45 ALR3d 1022.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension or sentence thereon, 58 ALR3d 1156.

Propriety, in imposing sentence for original offense after revocation of probation, of considering acts because of which probation was revoked, 65 ALR3d 1100.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 ALR3d 976.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs, 79 ALR3d 1025.

Propriety of conditioning probation upon defendant's posting of bond guaranteeing compliance with terms of probation, 79 ALR3d 1068.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 79 ALR3d 1083.

Propriety of conditioning probation on defendant's not associating with particular person, 99 ALR3d 967.

Propriety of conditioning probation on defendant's serving part of probationary period in jail or prison, 6 ALR4th 446.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 19 ALR4th 1251.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 ALR4th 755.

Propriety of conditioning probation on defendant's not entering specified geographical area, 28 ALR4th 725.

Propriety of conditioning probation on defendant's submission to polygraph or other lie detector testing, 86 ALR4th 709.

Propriety of conditioning probation on defendant's submission to drug testing, 87 ALR4th 929.

Propriety of conditioning parole on defendant's not entering specified geographical area, 54 ALR5th 743.

Propriety of probation condition exposing defendant to public shame or ridicule, 65 ALR5th 187.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 46 ALR6th 241.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 ALR Fed. 619.

42-8-35.1. Special alternative incarceration.

(a) In addition to any other terms or conditions of probation provided for under this chapter, the trial judge may provide that probationers sentenced for felony offenses committed on or after July 1, 1993, to a period of time of not less than one year on probation as a condition of probation must satisfactorily complete a program of confinement in a "special alternative incarceration—probation boot camp" unit of the department for a period of 120 days computed from the time of initial confinement in the unit; provided, however, the department may release the defendant upon service of 90 days in recognition of excellent behavior.

(b) Before a court can place this condition upon the sentence, an initial investigation will be completed by the probation officer which will indicate that the probationer is qualified for such treatment in that the individual does not appear to be physically or mentally disabled in a way that would prevent him from strenuous physical activity, that the individual has no obvious contagious diseases, that the individual is not less than 17 years of age nor more than 30 years of age at the time of

sentencing, and that the department has granted provisional approval of the placement of the individual in the “special alternative incarceration—probation boot camp” unit.

(c) In every case where an individual is sentenced under the terms of this Code section, the sentencing court shall, within its probation order, direct the department to arrange with the sheriff’s office in the county of incarceration to have the individual delivered to a designated unit of the department within a specific date not more than 15 days after the issuance of such probation order by the court.

(d) At any time during the individual’s confinement in the unit, but at least five days prior to his expected date of release, the department will certify to the trial court as to whether the individual has satisfactorily completed this condition of probation.

(e) Upon the receipt of a satisfactory report of performance in the program from the department, the trial court shall release the individual from confinement in the “special alternative incarceration—probation boot camp” unit. However, the receipt of an unsatisfactory report will be grounds for revocation of the probated sentence as would any other violation of a condition or term of probation.

(f) The satisfactory report of performance in the program from the department shall, in addition to the other requirements specified in this Code section, require participation of the individual confined in the unit in such adult education courses necessary to attain the equivalency of a grade five competency level as established by the State Board of Education for elementary schools. Those individuals who are mentally disabled as determined by initial testing are exempt from mandatory participation. After the individual is released from the unit, it shall be a special condition of probation that the individual participate in an education program in the community until grade five level competency is achieved or active probation supervision terminates. It shall be the duty of the department to certify to the trial court that such individual has satisfactorily completed this condition of probation while on active probation supervision. The receipt of an unsatisfactory report may be grounds for revocation of the probated sentence as would any other violation of a condition or term of probation. Under certain circumstances, the probationer may be exempt from this requirement if it is determined by the probation officer that community education resources are inaccessible to the probationer. (Ga. L. 1982, p. 1097, § 1; Code 1981, § 42-8-35.1, enacted by Ga. L. 1982, p. 1097, § 2; Ga. L. 1983, p. 3, § 31; Ga. L. 1984, p. 446, § 1; Ga. L. 1987, p. 654, § 1; Ga. L. 1991, p. 1751, § 1; Ga. L. 1993, p. 444, § 1; Ga. L. 1993, p. 1664, § 1; Ga. L. 1995, p. 1302, § 14.)

Editor's notes. — Ga. L. 1982, p. 2283, § 2 also enacted a Code Section 42-8-35.1, which was redesignated as Code Section 42-8-35.2 by Ga. L. 1983, p. 3, § 31.

Law reviews. — For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 161 (1992).

JUDICIAL DECISIONS

Incarceration not imposable as condition for probation. — In the absence of express statutory authority recognizing continuous and uninterrupted incarceration in a jail or penitentiary as a viable condition of probation, the imposition of any term of continuous and uninterrupted incarceration in a jail or penitentiary as a special condition of probation is unauthorized by law. *Pitts v. State*, 206 Ga. App. 635, 426 S.E.2d 257 (1992).

Penalty for violation of diversion center regulations. — It was error to hold that a probationer's failure to abide by the diversion center's regulations made the probationer liable for the felony offense of escape rather than for the mere revocation of the probationer's probation. Unsatisfactory performance in the pro-

gram would subject the probationer to revocation of probation as specified by O.C.G.A. § 42-8-38; however an alternative to revocation of probation would be the imposition of the more severe sanctions of O.C.G.A. § 16-10-52(a)(3) (redesignated as (a)(5) in 1997). When any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered. *Chandler v. State*, 257 Ga. 775, 364 S.E.2d 273 (1988).

Person convicted of a misdemeanor may not be sentenced to attend a boot camp as a condition of probation. *Johnson v. State*, 267 Ga. 77, 475 S.E.2d 595 (1996).

Cited in *Penaherrera v. State*, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

42-8-35.2. Special term of probation; when imposed; revocation; suspension.

(a) Notwithstanding any other provisions of law, the court, when imposing a sentence of imprisonment after a conviction of a violation of subsection (b) or (d) of Code Section 16-13-30 or after a conviction of a violation of Code Section 16-13-31, shall impose a special term of probation of three years in addition to such term of imprisonment; provided, however, upon a second or subsequent conviction of a violation of the provisions of such Code sections as stated in this subsection, the special term of probation shall be six years in addition to any term of imprisonment.

(b) A special term of probation imposed under this Code section may be revoked if the terms and conditions of probation are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special term of probation and the resulting new term of imprisonment shall not be diminished by the time which was spent on special probation. A person whose special term of probation has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special term of probation provided for in this Code section shall be in addition to, and not in lieu of, any other probation provided for by law and shall be supervised in the same manner as other probations as provided in this chapter.

(c) Upon written application by the probationer to the trial court, the court may, in its discretion, suspend the balance of any special term of probation, provided that at least one-half of said special term of probation has been completed and all fines associated with the original sentence have been paid and all other terms of the original sentence and the terms of the special probation have been met by the probationer. (Ga. L. 1982, p. 2283, § 1; Code 1981, § 42-8-35.1, enacted by Ga. L. 1982, p. 2283, § 2; Code 1981, § 42-8-35.2, as redesignated by Ga. L. 1983, p. 3, § 31; Ga. L. 1997, p. 143, § 42.)

Editor's notes. — The 1983 amendment, effective January 25, 1983, redesignated this Code section, which was enacted as Code Section 42-8-35.1, as Code

Section 42-8-35.2, since Ga. L. 1982, p. 1097, § 2 also enacted a Code Section 42-8-35.1, and revised language.

JUDICIAL DECISIONS

Special probation properly imposed. — Plain language of O.C.G.A. § 42-8-35.2(a) requires that a term of special probation be served “in addition to any term of imprisonment” rendered under O.C.G.A. § 16-13-30(d); thus, the two statutes do not conflict. Accordingly, a defendant was properly sentenced to a

ten-year incarceration followed by special probation, and the defendant’s claim that O.C.G.A. § 42-8-32.5 was implicitly repealed by the 1996 amendment to O.C.G.A. § 16-13-30 was without merit. *Mike v. State*, 290 Ga. App. 214, 659 S.E.2d 664 (2008).

RESEARCH REFERENCES

ALR. — Defendant’s right to credit for time spent in halfway house, rehabilitation center, or other restrictive environ-

ment as condition of probation, 24 ALR4th 789.

42-8-35.3. Conditions of probation for stalking or aggravated stalking.

Notwithstanding any other terms or conditions of probation which may be imposed, a court sentencing a defendant to probation for a violation of Code Section 16-5-90 or 16-5-91 may impose one or more of the following conditions on such probation:

(1) Prohibit the defendant from engaging in conduct in violation of Code Section 16-5-90 or 16-5-91;

(2) Require the defendant to undergo a mental health evaluation and, if it is determined by the court from the results of such evaluation that the defendant is in need of treatment or counseling, require the defendant to undergo mental health treatment or counseling by a court approved mental health professional, mental health facility, or facility of the Department of Behavioral Health and Developmental Disabilities. Unless the defendant is indigent, the cost of any such treatment shall be borne by the defendant; or

(3) Prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present. (Code 1981, § 42-8-35.3, enacted by Ga. L. 1993, p. 1534, § 4; Ga. L. 2009, p. 453, § 3-2/HB 228.)

Law reviews. — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 95 (1993).

42-8-35.4. Confinement in probation detention center.

(a) In addition to any other terms and conditions of probation provided for in this article, the trial judge may require that a defendant convicted of a felony and sentenced to a period of not less than one year on probation or a defendant who has been previously sentenced to probation for a forcible misdemeanor as defined in paragraph (7) of Code Section 16-1-3 or a misdemeanor of a high and aggravated nature and has violated probation or other probation alternatives and is subsequently sentenced to a period of not less than one year on probation shall complete satisfactorily, as a condition of that probation, a program of confinement, not to exceed 180 days, in a probation detention center. Probationers so sentenced shall be required to serve the period of confinement, not to exceed 180 days, specified in the court order.

(b) The court shall determine that the defendant is at least 17 years of age at the time of sentencing.

(c) During the period of confinement, the department may transfer the probationer to other facilities in order to provide needed physical and mental health care or for other reasons essential to the care and supervision of the probationer or as necessary for the effective administration and management of its facilities. (Code 1981, § 42-8-35.4, enacted by Ga. L. 1995, p. 627, § 1; Ga. L. 2009, p. 99, § 1/HB 226; Ga. L. 2012, p. 899, § 7-9/HB 1176.)

The 2012 amendment, effective July 1, 2012, in subsection (a), inserted “, not to exceed 180 days,” in the first and second sentences and substituted “shall be required” for “will be required” in the second sentence. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2009, p. 99, § 2/HB 226, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to probationers sentenced on or after July 1, 2009.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176,

not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For article on the

2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Confinement of misdemeanants. — Defendant was not eligible under O.C.G.A. § 17-10-3 for state probation detention center sentencing for misdemeanor battery since the defendant did not fit into one of the narrow categories set forth in O.C.G.A. § 42-8-35.4. *Anderson v. State*, 261 Ga. App. 716, 583 S.E.2d 549 (2003).

Sentence authorized. — O.C.G.A. § 42-8-35.4 allowed a court to order the confinement of a defendant in a probation detention center if the defendant was convicted of a felony and sentenced to a period of at least one year on probation. Defendant's sentence met these statutory requirements. *Johnson v. State*, 283 Ga. App. 425, 641 S.E.2d 655 (2007).

Construction with O.C.G.A. § 17-10-1. — Reading O.C.G.A. §§ 17-10-1(a)(3)(A) and 42-8-35.4 together, a court can confine a probation violator in a probation detention center, but not if probation is revoked for any of the reasons enumerated in O.C.G.A. § 17-10-1(a)(3)(A), and only if the defendant was put on probation previously for a forcible misdemeanor or a misdemeanor of a high and aggravated nature; a defendant who pled guilty to the misdemeanors of habitual violator, driving under the influence, possession of marijuana, and operating a vehicle without proof of insurance did not meet the criteria for confinement in a probation detention center upon revocation of probation under O.C.G.A. § 42-8-35.4, and so confinement in such a facility was unauthorized. *Wilson v. Windsor*, 280 Ga. 576, 630 S.E.2d 367 (2006).

Transfer. — Trial court did not err in denying a probationer's motion to modify

a sentence because the probationer's claim was cognizable only in a mandamus action against the Commissioner of the Department of Corrections or in a petition for habeas corpus since the probationer's sole complaint went to the Department's decision to transfer the probationer from a probation center to a state prison under O.C.G.A. § 42-8-35.4(c), and the probationer expressly agreed as a special condition of probation that the Department could transfer the probationer to other facilities if necessary; Code Section 42-8-35.4 does not require the Department to transfer a probationer to a probation detention center nor does the statute prohibit the Department from transferring a probationer to a prison. *Hillis v. State*, 303 Ga. App. 201, 692 S.E.2d 793 (2010).

Defendant eligible to serve ordered term of confinement. — Trial court did not err in denying the defendant's motion to correct an illegal sentence because, in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act when the legislature enacted the State-Wide Probation Act. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Confinement of misdemeanants. — While misdemeanants may only be referred to probation centers upon initial sentencing pursuant to O.C.G.A.

§ 42-8-35.4, misdemeanants may also be referred to such facilities pursuant to probation revocation proceedings under O.C.G.A. § 42-8-34.1 and after a proba-

tion revocation proceeding pursuant to O.C.G.A. § 17-10-1(a)(3)(A). 1999 Op. Att'y Gen. No. 99-14.

42-8-35.5. Confinement in probation diversion center.

(a) In addition to any other terms and conditions of probation provided in this article, the trial judge may require that probationers sentenced to a period of not less than one year on probation shall satisfactorily complete, as a condition of that probation, a program in a probation diversion center. Probationers so sentenced will be required to serve a period of confinement as specified in the court order, which confinement period shall be computed from the date of initial confinement in the diversion center.

(b) The court shall determine that the defendant is at least 17 years of age at the time of sentencing, is capable both physically and mentally of maintaining paid employment in the community, and does not unnecessarily jeopardize the safety of the community.

(c) The department may assess and collect room and board fees from diversion center program participants at a level set by the department. (Code 1981, § 42-8-35.5, enacted by Ga. L. 1995, p. 627, § 1.)

42-8-35.6. Family violence intervention program participation as condition of probation; cost borne by defendant.

(a) Notwithstanding any other terms or conditions of probation which may be imposed, a court sentencing a defendant to probation for an offense involving family violence as such term is defined in Code Section 19-13-10 shall require as a condition of probation that the defendant participate in a family violence intervention program certified pursuant to Article 1A of Chapter 13 of Title 19, unless the court determines and states on the record why participation in such a program is not appropriate.

(b) A court, in addition to imposing any penalty provided by law, when revoking a defendant's probation for an offense involving family violence as defined by Code Section 19-13-10, or when imposing a protective order against family violence, shall order the defendant to participate in a family violence intervention program certified pursuant to Article 1A of Chapter 13 of Title 19, unless the court determines and states on the record why participation in such program is not appropriate.

(c) The State Board of Pardons and Paroles, for a violation of parole for an offense involving family violence as defined by Code Section 19-13-10, shall require the conditional releasee to participate in a

family violence intervention program certified pursuant to Article 1A of Chapter 13 of Title 19, unless the State Board of Pardons and Paroles determines why participation in such a program is not appropriate.

(d) Unless the defendant is indigent, the cost of the family violence intervention program as provided by this Code section shall be borne by the defendant. If the defendant is indigent, then the cost of the program shall be determined by a sliding scale based upon the defendant's ability to pay. (Code 1981, § 42-8-35.6, enacted by Ga. L. 1996, p. 1113, § 2; Ga. L. 2002, p. 1435, § 6.)

Editor's notes. — Ga. L. 2002, p. 1435, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia's Family Violence Intervention Program Certification Act.'"

Ga. L. 2002, p. 1435, § 7, not codified by the General Assembly, provides that the amendments to this Code section shall apply to sentences or conditional release revocations that occur on or after July 1, 2003.

42-8-35.7. Drug and alcohol screening of probationers.

Unless the court has ordered more frequent such screenings, it shall be the duty of each probation supervisor to administer or have administered a drug and alcohol screening not less than once every 60 days to any person who is placed on probation and who, as a condition of such probation, is required to undergo regular, random drug and alcohol screenings, provided that the drug and alcohol screenings required by this Code section shall be performed only to the extent that necessary funds therefor are appropriated in the state budget. (Code 1981, § 42-8-35.7, enacted by Ga. L. 2004, p. 775, § 5.)

Cross references. — Drug free workplace programs, T. 34, C. 9, A. 11.

RESEARCH REFERENCES

ALR. — Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 46 ALR6th 241.

42-8-36. Duty of probationer to inform probation supervisor of residence and whereabouts; violations; unpaid moneys.

(a)(1) It shall be the duty of a probationer, as a condition of probation, to keep his or her probation supervisor informed as to his or her residence. Upon the recommendation of the probation supervisor, the court may also require, as a condition of probation and under such terms as the court deems advisable, that the probationer keep the probation supervisor informed as to his or her whereabouts.

(2) The running of a probated sentence shall be tolled upon:

(A) The failure of a probationer to report to his or her probation supervisor as directed or failure to appear in court for a probation revocation hearing; either of such failures may be evidenced by an affidavit from the probation supervisor setting forth such failure; or

(B) The filing of a return of non est inventus or other return to a warrant, for the violation of the terms and conditions of probation, that the probationer cannot be found in the county that appears from the records of the probation supervisor to be the probationer's county of residence. Any officer authorized by law to issue or serve warrants may return the warrant for the absconded probationer showing non est inventus.

(3) The effective date of the tolling of the sentence shall be the date the court enters a tolling order and shall continue until the probationer shall personally report to the probation supervisor, is taken into custody in this state, or is otherwise available to the court.

(4) Any tolled period of time shall not be included in computing creditable time served on probation or as any part of the time that the probationer was sentenced to serve.

(b) Any unpaid fines, restitution, or any other moneys owed as a condition of probation shall be due when the probationer is arrested; but, if the entire balance of his probation is revoked, all the conditions of probation, including moneys owed, shall be negated by his imprisonment. If only part of the balance of the probation is revoked, the probationer shall still be responsible for the full amount of the unpaid fines, restitution, and other moneys upon his return to probation after release from imprisonment. (Ga. L. 1958, p. 15, § 9; Ga. L. 1982, p. 3, § 42; Ga. L. 1984, p. 1317, § 1; Ga. L. 1986, p. 492, § 1; Ga. L. 1987, p. 455, § 1; Ga. L. 1989, p. 452, § 1; Ga. L. 1992, p. 6, § 42; Ga. L. 2010, p. 557, § 1/HB 859.)

Law reviews. — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

For note on 1989 amendment of this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1910, § 1081(4) are included in the annotations for this Code section.

Construction with O.C.G.A. § 17-10-10. — Section 17-10-10, relating to concurrent service of sentences, must yield to O.C.G.A. § 42-8-36 if there is any conflict between them. *Downs v. State*, 163 Ga. App. 485, 295 S.E.2d 152 (1982).

Probation officer's responsibility for material misrepresentation. — State probation officer was entitled to qualified immunity as to a probationer's malicious prosecution claim based on the officer's sentence miscalculation because it was not clearly established that the officer's alleged conduct would subject the officer to liability since there were published decisions from the court granting absolute immunity to probation officers

who were alleged to have made material misrepresentations that impacted the offender's sentence. *Williams v. Morahan*, No. 13-10303, 2013 U.S. App. LEXIS 18837 (11th Cir. Sept. 11, 2013) (Unpublished).

Notice and hearing required for probation revocation. — When a person is placed under a probation sentence, probation cannot be revoked without notice to probationer and an opportunity to be heard on the question as to whether the probationer violated its terms. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Minimum requirements of due process for parole revocation are a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Reed v. State*, 151 Ga. App. 224, 259 S.E.2d 209 (1979).

Hearing required need not meet the requisites of a jury trial; the proceedings may be informal or summary. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Judge is the sole trier of fact and when there is even slight evidence the appellate court will not interfere with the revocation unless there has been an abuse of discretion. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Order revoking probation must state the evidence relied upon and the reasons for revocation. *Rey v. State*, 156 Ga. App. 474, 274 S.E.2d 822 (1980).

Judge's discretion considerable. — Discretion of the judge in revoking probation will not be interfered with unless grossly abused. *Olsen v. State*, 21 Ga. App. 795, 95 S.E. 269 (1918); *Towns v. State*, 25 Ga. App. 419, 103 S.E. 724, cert. denied, 25 Ga. App. 841, (1920).

Leaving jurisdiction of court is ground for revocation. *Shamblin v. Penn*, 148 Ga. 592, 97 S.E. 520 (1918).

Limitation upon power to withdraw parole. — Parole cannot lawfully be revoked as a mere matter of caprice. In such hearing the judge is the sole judge of the credibility of the witnesses, but the judge is not permitted to withdraw a parole unless there is sufficient evidence to authorize a finding that one or more of the conditions upon which the parole was

granted has been violated. *Williams v. State*, 162 Ga. 327, 133 S.E. 843 (1926).

When it cannot be determined whether the criminal act charged against the probationer as in violation of the probationer's parole was committed prior to the imposition of the sentence or subsequent thereto, a finding revoking the parole would be contrary to law and would not be authorized. *Williams v. State*, 162 Ga. 327, 133 S.E. 843 (1926).

Probation properly withdrawn. — When an arrest warrant alleging probation violations was returned non est inventus, the court did not err in tolling the probated sentence and in reinstating defendant's probation, even though the state could not prove any probation violations at the revocation hearing. *Robson v. State*, 226 Ga. App. 209, 485 S.E.2d 822 (1997).

Tolling of a probated sentence. — When a probation warrant was returned non est inventus, the tolling function initiated under paragraph (1) of subsection (a) was not interrupted by defendant's arrest on unrelated charges in another county. *Cauldwell v. State*, 211 Ga. App. 417, 439 S.E.2d 90 (1993).

Defendant's probation was properly tolled under O.C.G.A. § 42-8-36(a)(2) after the trial court found that the probation supervisor's affidavit set forth the factual averments required by O.C.G.A. § 42-8-36(a)(2), as it informed the court that the defendant had absconded from a known residence and that the defendant's current residence was unknown, a violation of the defendant's probation conditions; thus, the trial court did not err in revoking the defendant's first offender probation, adjudicating the defendant guilty, and imposing sentence on the defendant. *Vincent v. State*, 271 Ga. App. 138, 608 S.E.2d 748 (2004).

Because no language in a probation revocation affidavit indicated that the defendant had absconded and could not be found, and the warrant stated only that the defendant was in arrears in the payment of ordered restitution, a trial court erred in tolling the defendant's probation pursuant to O.C.G.A. § 42-8-36(a) and sentencing the defendant accordingly. *Campbell v. State*, 280 Ga. App. 561, 634 S.E.2d 512 (2006).

Trial court improperly denied a defendant's motion to terminate the defendant's probation by incorrectly ruling that the probation was properly tolled based on O.C.G.A. § 42-8-36 since the state alleged that the defendant absconded and could not be found. The warrant that was returned showing that the defendant could not be found contained no oath or attestation and, therefore, failed as an affidavit, which was a requirement of § 42-8-36. *Wilson v. State*, 292 Ga. App. 540, 664 S.E.2d 890 (2008).

Trial court did not err in holding that a probationer's probated sentence was tolled, under former O.C.G.A. § 42-8-36(a)(1), because the probationer pointed to evidence in the appellate record supporting the probationer's assertions that the probationer's arrest warrant, with the signed statement by a deputy of non est inventus, was not found in the

clerk's file or otherwise returned to the court. *Thompson v. State*, 313 Ga. App. 294, 721 S.E.2d 106 (2011).

Order revoking probationer's parole is not a final judgment as is subject to review. *Antonopoulos v. State*, 151 Ga. 466, 107 S.E. 156 (1921); *Troup v. State*, 27 Ga. App. 636, 109 S.E. 681 (1921); *Jackson v. State*, 27 Ga. App. 648, 110 S.E. 423 (1921).

Fines. — Because the defendant's fine was not assessed as a condition of probation, but as a part of the defendant's DUI sentence, the trial court did not err in denying the defendant's motion to negate or suspend the fine when defendant's probation was revoked. *Rouse v. State*, 256 Ga. App. 579, 569 S.E.2d 261 (2002).

Cited in *Dilas v. State*, 159 Ga. App. 39, 282 S.E.2d 690 (1981); *Cooper v. State*, 160 Ga. App. 287, 287 S.E.2d 284 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Tolling of probated sentence. — This section provides for the tolling of a probated sentence when the specified returns to a warrant have been made; the mere issuance of an arrest warrant does

not toll the probated sentence; however, a probated sentence is suspended automatically upon an entry of one of the specified returns to such warrant. 1968 Op. Att'y Gen. No. 68-303.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Imposition or enforcement of sentence which has been suspended without authority, 141 ALR 1225.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 ALR3d 781.

Admissibility of hearsay evidence in probation revocation hearings, 11 ALR4th 999.

42-8-37. Effect of termination of probated portion of sentence; review of cases of persons receiving probated sentence; reports.

(a) Upon the termination of the probated portion of a sentence, the probationer shall be released from probation and shall not be liable to sentence for the crime for which probation was allowed; provided, however, that the foregoing shall not be construed to prohibit the conviction and sentencing of the probationer for the subsequent commission of the same or a similar offense or for the subsequent continuation of the offense for which he or she was previously sentenced.

(b) The court may at any time cause the probationer to appear before it to be admonished or commended and, when satisfied that its action would be for the best interests of justice and the welfare of society, may discharge the probationer from further supervision.

(c) The case of each person receiving a probated sentence of more than two years shall be reviewed by the probation supervisor responsible for that case after service of two years on probation, and a written report of the probationer's progress shall be submitted to the sentencing court along with the supervisor's recommendation as to early termination. Each such case shall be reviewed and a written report submitted annually thereafter until the termination, expiration, or other disposition of the case. (Ga. L. 1956, p. 27, § 11; Ga. L. 1972, p. 604, § 9; Ga. L. 1985, p. 516, § 1; Ga. L. 2012, p. 899, § 7-10/HB 1176.)

The 2012 amendment, effective July 1, 2012, in subsection (a), substituted "probated portion of a sentence" for "period of probation", inserted "that" near the middle, and inserted "or she" near the end; designated the former second sentence of subsection (a) as present subsection (b); redesignated former subsection (b) as present subsection (c), and, in subsection (c), substituted "The" for "Upon the request of the chief judge of the court from which said person was sentenced, the" in the first sentence, in the second sentence, substituted "Each" for "Upon the request of the chief judge of the court from which said person was sentenced, each", and deleted ", or more often if required," following "thereafter". See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Formalization of "discharge" unnecessary. — "Discharge" of a non-first-offender probationer is automatic upon the successful completion of the terms of the sentence and is not dependent upon the subsequent formalization of that successful completion. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

Effect of completing first-offender probationary sentence. — Because the

defendant had completed a three-year first-offender probationary sentence and had been discharged without court adjudication of guilt pursuant to O.C.G.A. § 42-8-62 at the time the probationer allegedly violated O.C.G.A. § 16-11-131, the trial court properly dismissed the charge. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Governor's authority to remit forfeited bail bond, 77 ALR2d 988.

42-8-38. Arrest or graduated sanctions for probationers violating terms; hearing; disposition of charge; procedure when probation revoked in county other than that of conviction.

(a) Whenever, within the period of probation, a probation supervisor believes that a probationer under his or her supervision has violated his or her probation in a material respect, if graduated sanctions have been made a condition of probation by the court, the probation supervisor may impose graduated sanctions as set forth in Code Section 42-8-23 to address the specific conduct leading to such violation or, if the circumstances warrant, may arrest the probationer without warrant, wherever found, and return the probationer to the court granting the probation or, if under supervision in a county or judicial circuit other than that of conviction, to a court of equivalent original criminal jurisdiction within the county wherein the probationer resides for purposes of supervision. Any officer authorized by law to issue warrants may issue a warrant for the arrest of the probationer upon the affidavit of one having knowledge of the alleged violation, returnable forthwith before the court in which revocation proceedings are being brought.

(b) The court, upon the probationer being brought before it, may commit him or release him with or without bail to await further hearing or it may dismiss the charge. If the charge is not dismissed at this time, the court shall give the probationer an opportunity to be heard fully at the earliest possible date on his own behalf, in person or by counsel, provided that, if the revocation proceeding is in a court other than the court of the original criminal conviction, the sentencing court shall be given ten days' written notice prior to a hearing on the merits.

(c) After the hearing, the court may revoke, modify, or continue the probation. If the probation is revoked, the court may order the execution of the sentence originally imposed or of any portion thereof. In such event, the time that the defendant has served under probation shall be considered as time served and shall be deducted from and considered a part of the time he was originally sentenced to serve.

(d) In cases where the probation is revoked in a county other than the county of original conviction, the clerk of court in the county revoking probation may record the order of revocation in the judge's minute docket, which recordation shall constitute sufficient permanent record of the proceedings in that court. The clerk shall send one copy of the order revoking probation to the department to serve as a temporary commitment and shall send the original order revoking probation and all other papers pertaining thereto to the county of original conviction

to be filed with the original records. The clerk of court of the county of original conviction shall then issue a formal commitment to the department. (Ga. L. 1956, p. 27, § 12; Ga. L. 1960, p. 857, § 1; Ga. L. 1966, p. 440, § 1; Ga. L. 2012, p. 899, § 7-11/HB 1176.)

The 2012 amendment, effective July 1, 2012, in the first sentence of subsection (a), twice inserted “or her” near the beginning, substituted “respect, if graduated sanctions have been made a condition of probation by the court, the probation supervisor may impose graduated sanctions as set forth in Code Section 42-8-23 to address the specific conduct leading to such violation or, if the circumstances warrant, may” for “respect, he may”, and substituted “return the probationer” for “return him”. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before

July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Law reviews. — For article, “A Review of Georgia’s Probation Laws,” see 6 Ga. St. B.J. 255 (1970). For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For comment criticizing *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975), see 27 Mercer L. Rev. 325 (1975).

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General Consideration

Scope of section. — Since the defendant was sentenced to the county jail when not at work, the defendant could not be considered to be on probation, thus an action by the trial court to modify and extend the defendant's sentence under O.C.G.A. § 42-8-38 was a nullity, since § 42-8-38 relates solely to revocation of probation. *Howell v. State*, 160 Ga. App. 562, 287 S.E.2d 573 (1981).

When probation may be revoked or modified. — Probated portion of a sentence may be revoked or modified at any time during the term of the probated sentence after hearing and finding of probation violation. *Logan v. Lee*, 247 Ga. 608, 278 S.E.2d 1 (1981).

Determination of revocation. — Even when a condition of probation has not been complied with, circumstances of an individual defendant must be taken into consideration in determining whether revocation is warranted. *Malcom v. State*, 162 Ga. App. 587, 291 S.E.2d 756 (1982).

Increase of sentence. — While the trial court has jurisdiction to change or modify the terms of the original sentence, it cannot increase the sentence originally passed. *Howell v. State*, 160 Ga. App. 562, 287 S.E.2d 573 (1981).

Probationary status only to be considered. — Subsection (c) of O.C.G.A. § 42-8-38 limits the power of the trial court to a decision affecting only the probationary status of the previously convicted probationer. In no way does it provide for the imposition of a sentence of any kind based upon the charge underlying an alleged violation of the terms of a previously ordered probation. *Abney v. State*, 170 Ga. App. 265, 316 S.E.2d 845 (1984).

Violation of diversion center regulations. — It was error to hold that a probationer's failure to abide by the diversion center's regulations made the probationer liable for the felony offense of escape rather than for the mere revocation of the probationer's probation. Unsatisfactory performance in the program would subject the probationer to revocation of probation as specified by O.C.G.A. § 42-8-38; however, an alternative to revocation of probation would be the im-

sition of the more severe sanctions of O.C.G.A. § 16-10-52(a)(3) (redesignated as (a)(5) in 1997). When any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered. *Chandler v. State*, 257 Ga. 775, 364 S.E.2d 273 (1988).

Effect of failure to revoke probation on subsequent criminal trial. — That the quantum of proof necessary to revoke probation has been changed from "slight evidence" to "a preponderance of the evidence" does not affect the rule that a ruling in favor of the probationer, continuing rather than revoking probation, has no collateral estoppel effect in a subsequent criminal trial. *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990).

Unambiguous revocation of probation not subject to subsequent adjustment. — After the defendant received a sentence which unambiguously revoked the defendant's prior probation, the defendant fully served the time imposed therein, and there was no indication in the sentence that any portion of the defendant's probation was to be reinstated upon the defendant's release, that sentence was fully satisfied when the defendant was released from jail, and the court's order subsequently revoking the defendant's probation was invalid as there was nothing left to revoke. *Hulen v. State*, 207 Ga. App. 465, 428 S.E.2d 405 (1993).

Applicable period. — Trial court misinterpreted O.C.G.A. § 42-8-38(a) as dealing with matters which were done within the period of probation when the court denied the state's petition to revoke a probationer's probation. *State v. Huckeba*, 258 Ga. App. 627, 574 S.E.2d 856 (2002).

When a convicted defendant's "future good behavior" has already been compromised by the commission of another criminal act even before the formal probationary period begins, a trial court should not be required to allow such defendant to serve a previously imposed probated sentence when the court deems that protection of society demands revocation. The trial court's interpretation of O.C.G.A. § 42-8-38(a) as precluding the exercise of the court's discretion to consider the state's petition to revoke the defendant's

General Consideration (Cont'd)

probation was an error as a matter of law. *State v. Huckeba*, 258 Ga. App. 627, 574 S.E.2d 856 (2002).

Warrantless searches vs. warrantless arrests. — Trial court erred in denying a probationer's motion to suppress the evidence seized from the probationer's apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence seized without a warrant after the probationer was not found in the apartment had to be excluded under the Fourth Amendment as the search conducted was only permissible insofar as the search involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer's arrest. The probationer was never placed on notice that the probationer was going to be subjected to warrantless searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. *Jones v. State*, 282 Ga. 784, 653 S.E.2d 456 (2007).

Cited in *King v. Adams*, 410 F.2d 455 (5th Cir. 1969); *Young v. State*, 123 Ga. App. 791, 182 S.E.2d 676 (1971); *Brogdon v. State*, 136 Ga. App. 121, 220 S.E.2d 471 (1975); *Taylor v. State*, 136 Ga. App. 317, 221 S.E.2d 224 (1975); *Ware v. State*, 137 Ga. App. 673, 224 S.E.2d 873 (1976); *Robinson v. State*, 139 Ga. App. 480, 228 S.E.2d 615 (1976); *Alexander v. State*, 141 Ga. App. 16, 232 S.E.2d 364 (1977); *Palmer v. State*, 144 Ga. App. 480, 241 S.E.2d 597 (1978); *Harper v. State*, 146 Ga. App. 337, 246 S.E.2d 391 (1978); *Kilgore v. State*, 155 Ga. App. 739, 272 S.E.2d 505 (1980); *McElroy v. State*, 247 Ga. 355, 276 S.E.2d 38 (1981); *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *State v. Brinson*, 248 Ga. 380, 283 S.E.2d 463 (1981); *Garland v. State*, 160 Ga. App. 97, 286 S.E.2d 330 (1981); *Brewer v. State*, 162 Ga. App. 228, 291 S.E.2d 87 (1982); *Brooks v. State*, 162 Ga. App. 485, 292 S.E.2d 89 (1982); *Shaw v. State*, 164 Ga. App. 208, 296 S.E.2d 765 (1982); *Smith v. State*, 164 Ga. App. 384, 297 S.E.2d 738 (1982); *Beasley v. State*, 165 Ga. App. 160, 299 S.E.2d 886 (1983);

Strickland v. State, 165 Ga. App. 197, 300 S.E.2d 537 (1983); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Williams v. State*, 253 Ga. App. 10, 557 S.E.2d 473 (2001); *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

Probation Revocation Procedure**1. In General**

Revocation of probation based upon unprosecuted crime. — Revocation of probation based at least in part upon alleged commission of a crime for which a party has not yet stood trial and been found guilty does not contravene principles of due process and fundamental fairness. *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980).

Revocation by different court. — Probation may be revoked by a court of equivalent original criminal jurisdiction when the probationer's county of supervision and residence is different from the county of original conviction. *Biddy v. State*, 132 Ga. App. 264, 208 S.E.2d 22 (1974).

Judge in the Dublin judicial circuit had jurisdiction to revoke a former prisoner's probation because: (1) while the prisoner pled guilty in the Macon judicial circuit and the prisoner's sentence was probated, the prisoner was involved in a theft which resulted in a partial revocation of probation and assignment to a probation detention center in the Dublin judicial circuit and, during the prisoner's confinement in the Dublin judicial circuit, the prisoner violated the terms of the prisoner's probation; and (2) because the prisoner was under supervision in a judicial circuit other than that of the prisoner's conviction, the prisoner was properly returned to a court of equivalent original criminal jurisdiction within the county wherein the prisoner was residing for the purposes of supervision under O.C.G.A. § 42-8-38(a). *Williams v. Donald*, No. 5:06-cv-348, 2007 U.S. Dist. LEXIS 59438 (M.D. Ga. Aug. 14, 2007).

Revocation based on felony. — When an act on which revocation of probation is based is a felony, it is not erroneous for the hearing judge to base revocation on that accusation, before the

accused shall have first been tried and found guilty of the criminal charge. *Evans v. State*, 153 Ga. App. 764, 266 S.E.2d 545 (1980).

Discretion following technical probation violations. — Following technical violations of the conditions of probation, short of conviction for another crime or a determination of initial ineligibility, the trial court had discretion to continue a first offender on probation without first revoking first offender status, entering an adjudication of guilt, or resentencing for the underlying offense. *Mohammed v. State*, 226 Ga. App. 387, 486 S.E.2d 652 (1997).

Nothing in O.C.G.A. § 42-8-38 ties the affidavit requirement for the issuance of arrest warrants to the validity of a subsequent revocation of probation. Even if the defendant's arrest on charges of violating the defendant's probation was illegal, that is not a bar to the subsequent revocation of the defendant's probation. *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

Question as to excessiveness of sentence. — Any question as to the excessiveness of a sentence which is otherwise legal should be addressed to the sentence review panel. *Strickland v. State*, 158 Ga. App. 340, 280 S.E.2d 168 (1981).

Findings when record sufficient. — When the record from which basis for revocation can be ascertained is sufficient, it is not necessary for the trier of fact to commit the judge's findings to a separate piece of paper. *Hayes v. State*, 168 Ga. App. 94, 308 S.E.2d 227 (1983).

Separate hearing after grounds for revocation discovered. — Court need not hold separate dispositional or sentencing hearing after finding grounds for revocation of probation. *Hayes v. State*, 157 Ga. App. 659, 278 S.E.2d 424 (1981).

Persons empowered to make warrantless arrest of probation violators. — Power to make a warrantless arrest of a known probation violator is not limited to the probation supervisor, but also includes a law enforcement officer with general arrest powers who has trustworthy information as to the probation violation. *Battle v. State*, 254 Ga. 666, 333 S.E.2d 599 (1985).

2. Necessity for Prescribed Rules and Regulations

Purpose for showing rules and regulations prescribed. — Probated sentences must show the rules and regulations prescribed so that a violation of such rules and regulations will revoke the parole. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957).

Ambiguous sentence construed in favor of defendant. — Trial court erred in revoking purported probation sentence since construed as a whole, the sentence was an alternative one and the defendant was to be discharged upon payment of the fines and costs. *Favors v. State*, 95 Ga. App. 318, 97 S.E.2d 613 (1957).

Violations considered by court at probated sentence revocation hearing. — Since the court cannot revoke a probated sentence unless that sentence has conditions sufficiently definite to be enforceable, and unless those conditions have not been complied with, and since the defendant is entitled to notice and an opportunity to be heard on the charge which is brought against the defendant, only those alleged violations which are terms of the original sentence, and notice of the violation of which has been given the probationer, may be considered by the court on the hearing to revoke the probated sentence. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Revocation must be based on ground stated in petition. — When the trial court erroneously ruled that "theft by disposing" is a lesser included offense of theft by taking, revocation of the defendant's probation could not stand because the revocation was not made on the ground stated in the petition. *Sosbee v. State*, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

3. Constitutional Requirements

A. In General

Probation as privilege. — Probation is granted as a privilege, and not as a matter of right; and revocation of probation is punishment for the crime for which the defendant was convicted in the first instance. *Scott v. State*, 131 Ga. App. 504,

Probation Revocation**Procedure** (Cont'd)**3. Constitutional****Requirements** (Cont'd)**A. In General** (Cont'd)

206 S.E.2d 137 (1974); *Heard v. State*, 154 Ga. App. 420, 268 S.E.2d 757 (1980).

Applicability of double jeopardy clause. — Because parole and probation revocation proceedings are not designed to punish a criminal defendant for violation of a criminal law and, because the purpose of parole and probation revocation proceedings is to determine whether a parolee or probationer has violated the conditions of the probationer's parole or probation, such proceedings are fundamentally distinguishable from juvenile proceedings, the latter being indistinguishable from a criminal prosecution, and, thus, the double jeopardy clause of U.S. Const., amend. 5 does not apply to parole and probation revocation proceedings. *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

Revocation based on failure to pay restitution. — Revocation of probation, premised upon failure to timely pay court ordered restitution, does not violate due process and equal protection. *Wilson v. State*, 155 Ga. App. 825, 273 S.E.2d 210 (1980).

Minimum requirements of due process for parole revocation are: a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Reed v. State*, 151 Ga. App. 224, 259 S.E.2d 209 (1979).

Although this section does not require it, "a written statement by the fact finders as to the evidence relied on and reasons for revoking probation" has been established as a minimum due process requirement in assuring the constitutional rights of an individual who will be condemned to suffer grievous loss by restraint of liberty. *Moore v. State*, 151 Ga. App. 791, 261 S.E.2d 730 (1979).

Contents of revocation order. — Order revoking probation must state evidence relied upon and reasons for revocation. *Rey v. State*, 156 Ga. App. 474, 274 S.E.2d 822 (1980).

Use of uncorroborated accomplice testimony in hearing. — When uncor-

roborated accomplice testimony is shown inherently to lack credit, or is sufficiently controverted, abuse of discretion in admitting it in hearing may become manifest. *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975).

B. Notice

Notice and hearing required for revocation. — When probation is sought to be revoked, the defendant is entitled to notice, which notice must be sufficient to inform the defendant of the manner in which the defendant has violated the defendant's parole and give the defendant an opportunity to defend. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Failure to afford probationer notice and a hearing would render a revocation order void for lack of due process of law. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963); *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

In order to revoke the probationary features of a sentence the defendant must have notice and opportunity to be heard, the notice being sufficient to inform the defendant not only of the time and place of the hearing and the fact that revocation is sought, but the grounds upon which it is based. *Horton v. State*, 122 Ga. App. 106, 176 S.E.2d 287 (1970).

When a person is placed under a probation sentence, probation cannot be revoked without notice to the probationer and an opportunity to be heard on the question as to whether the probationer violated its terms. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Application of slight evidence rule. — When the defendant received written notice of the claimed violation of probation, the disclosure of the evidence against the defendant, an opportunity to be heard in person and to present witnesses and document evidence, the right to confront and cross-examine adverse witnesses, heard by a neutral and detached judicial officer, with a written statement by the fact finder as to the evidence relied on and reasons for revoking probation, application of the "slight evidence" rule did not deny the defendant due process and equal protection. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

C. Hearing

Time period between petition and hearing. — Absent special circumstances, 30 days is a reasonable time period between petition and hearing, for the sake of both the state and the offender. *Anderson v. State*, 166 Ga. App. 521, 304 S.E.2d 747 (1983).

Purpose of a probation revocation hearing is to determine whether the conduct of the defendant during the probation period has conformed to the terms and conditions outlined in the order of probation. *Evans v. State*, 153 Ga. App. 764, 266 S.E.2d 545 (1980).

Form of meeting. — Hearing required need not meet the requisites of a jury trial; the proceedings may be informal or summary. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972); *Wellons v. State*, 144 Ga. App. 218, 240 S.E.2d 768 (1977).

Applicability of rules of evidence. — Rules of evidence of normal criminal proceedings are not applicable to a hearing under this section and evidentiary matters are within the discretion of the trial judge. *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975).

Use of preliminary hearing to establish probable cause for revocation hearing. — Failure of trial court to afford a preliminary hearing to establish probable cause to conduct a revocation of probation hearing followed by an evidentiary show cause hearing, rather than consolidating the procedure into one hearing does not violate due process. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

Criminal nature of act violating probation. — Hearing of this character is not a trial on a criminal charge, but is a hearing to judicially determine whether the conduct of the defendant during the probation period has conformed to the course outlined in the order of probation. If the act which violated the probation should happen to be a criminal one, it does not thereby change the character of the hearing. *Sparks v. State*, 77 Ga. App. 22, 47 S.E.2d 678 (1948); *Johnson v. State*, 214 Ga. 818, 108 S.E.2d 313 (1959).

Fact that act alleged to be in violation of

probation is of a criminal nature does not change character of revocation hearing. *Robinson v. State*, 154 Ga. App. 591, 269 S.E.2d 86 (1980).

Stages for offering defenses. — Fact that certain defenses could also be advanced in a trial upon the merits of the offense does not in any way drain the legal effect of a failure to offer defenses at the dispositional hearing. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

Accusation by indictment as opposed to violation of probationary conditions. — Defendant is not in the position of one accused by indictment, even though the probationary condition alleged to have been violated is the commission of a crime. *Jackson v. State*, 140 Ga. App. 659, 231 S.E.2d 554 (1976).

Trial court's discretion to grant motion for psychiatric examination. — When no special plea of insanity is filed, the granting of a motion for a psychiatric examination is within the sound discretion of the trial court. This rule attaches in probation revocation hearings as well as in criminal proceedings. *Mann v. State*, 154 Ga. App. 677, 269 S.E.2d 863 (1980).

Review when no hearing transcript exists. — When there is no transcript of hearing, an appellate court is bound to assume that the trial judge's findings are supported by sufficient competent evidence. *Nalley v. State*, 147 Ga. App. 634, 249 S.E.2d 685 (1978).

D. Right to Counsel

Probation revocation hearing. — There is no right to counsel at a probation revocation hearing. *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975).

Defendant is not ordinarily entitled to appointed counsel for a probation revocation hearing. *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983).

Indigent defendant. — Indigent is not entitled to appointed counsel at the indigent's probation revocation hearing. *Nalley v. State*, 147 Ga. App. 634, 249 S.E.2d 685 (1978).

Statute providing for benefit of counsel. — Proceeding to revoke a probated sentence of one convicted of a crim-

Probation Revocation**Procedure** (Cont'd)**3. Constitutional****Requirements** (Cont'd)**D. Right to Counsel** (Cont'd)

inal offense is not a criminal proceeding, and the failure of the court to supply the convict with counsel is not a denial of the right to counsel unless a statute provides for benefit of counsel at such a hearing. *Dutton v. Willis*, 223 Ga. 209, 154 S.E.2d 221 (1967).

Circumstances requiring appointment of legal counsel. — See *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983).

E. Trial by Jury

Constitutionality. — Ga. L. 1956, p. 27, § 12 (see now O.C.G.A. § 42-8-38) is not unconstitutional as a violation of Ga. Const. Art. I, Sec. I, Para. V (see now Ga. Const. 1983, Art. I, Sec. I, Para. XI) because no provision is made for trial by jury upon the hearing to determine whether a parole shall be revoked. Probation is granted as a privilege, and not as a matter of right; and the revocation of the probation is punishment for the crime for which the defendant was convicted in the first instance. *Johnson v. State*, 214 Ga. 818, 108 S.E.2d 313 (1959).

Probationer not guaranteed trial by jury. — Hearing on a revocation is not a trial on a criminal charge and the probationer has no right to a trial by jury. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963); *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

F. Search and Seizures

Basis for reasonable search by probation officer. — Search by a probation officer is reasonable if it is actuated by the legitimate operation of the probation supervision process and the probation officer acts reasonably in performing those duties. *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979), overruled on other grounds, *State v. Thackston*, 289 Ga. 412, 716 S.E.2d 517 (2011).

Search warrant based on information derived from informants. — If an

affiant shows ample facts to authorize the issuing magistrate to conclude that there is probable cause to believe that a crime of the nature set forth in the affidavits has been committed and that evidence of the crime would be produced by a search of the premises described in the affidavits, the fact that much of the affiant's information is derived from informants will not vitiate the warrant. *Causey v. State*, 148 Ga. App. 755, 252 S.E.2d 664 (1979).

Effect of illegality of arrest on revocation. — Assuming that the defendant's arrest on charges of violating the defendant's probation was illegal, this would not in and of itself constitute a bar to the subsequent revocation of the defendant's probation. *Hayes v. State*, 157 Ga. App. 659, 278 S.E.2d 424 (1981).

G. Use of Habeas Corpus

Correction of errors or irregularities committed at trial. — When no exception was taken to order revoking probation as provided by law, the petitioner may not seek review, by habeas corpus, of the judgment revoking the probationary sentence imposed upon his wife, since habeas corpus cannot be used as a substitute for appeal or other remedial procedure, for the correction of errors or irregularities alleged to have been committed by a trial court. *Balkcom v. Parris*, 215 Ga. 123, 109 S.E.2d 48 (1959).

Showing that judgment of revocation is void required. — Allegations in petition for habeas corpus that order of revocation under attack was premature in that the probationer was entitled to a jury trial on the question of whether or not the probationer had committed the offense in violation of the terms of the probationer's probation, prior to the revocation, that three days' notice of the revocation hearing was not sufficient or adequate notice, that the probationer had been acquitted by a jury, subsequent to the order of revocation, of the offense alleged to have constituted the probation violation, and that the evidence on the hearing was insufficient to sustain the exercise of the judge's discretion in revoking probation were insufficient to sustain the prisoner's discharge under the writ in that such allegations failed to show the judgment of

revocation to be void, which is requisite to such relief. *Balkcom v. Parris*, 215 Ga. 123, 109 S.E.2d 48 (1959).

Quantum of Proof Needed

1. In General

Quantum of evidence required construed. — Quantum of evidence sufficient to justify trial court in revoking a probationary sentence is less than that necessary to sustain a conviction in the first instance. *Lankford v. State*, 112 Ga. App. 204, 144 S.E.2d 463 (1965); *Boston v. State*, 128 Ga. App. 576, 197 S.E.2d 504 (1973); *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975); *Barlow v. State*, 140 Ga. App. 667, 231 S.E.2d 561 (1976); *Swain v. State*, 157 Ga. App. 868, 278 S.E.2d 743 (1981); *Keasler v. State*, 165 Ga. App. 561, 301 S.E.2d 915 (1983).

All that is required to revoke probation is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation. *Evans v. State*, 153 Ga. App. 764, 266 S.E.2d 545 (1980).

Revocation of probation can rest upon evidence less than is required for conviction. *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983).

Quality or quantity necessary for revocation is not that demanded for conviction of a crime. *Seldon v. State*, 166 Ga. App. 326, 304 S.E.2d 475 (1983).

2. Slight Evidence Test

Evidence for revocation. — Only slight evidence is required to authorize revocation. *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975); *Barlow v. State*, 140 Ga. App. 667, 231 S.E.2d 561 (1976); *Gilbert v. State*, 150 Ga. App. 339, 258 S.E.2d 27 (1979); *Wade v. State*, 152 Ga. App. 529, 263 S.E.2d 268 (1979); *Pickard v. State*, 152 Ga. App. 707, 263 S.E.2d 679 (1979); *Morris v. State*, 153 Ga. App. 415, 265 S.E.2d 337 (1980); *White v. State*, 153 Ga. App. 808, 266 S.E.2d 528 (1980); *Heard v. State*, 154 Ga. App. 420, 268 S.E.2d 757 (1980); *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980); *Robinson v. State*, 154 Ga. App. 591, 269

S.E.2d 86 (1980); *Lynch v. State*, 158 Ga. App. 232, 279 S.E.2d 537 (1981); *Davis v. State*, 165 Ga. App. 709, 302 S.E.2d 610 (1983); *Seldon v. State*, 166 Ga. App. 326, 304 S.E.2d 475 (1983).

Evidence for violation of probation.

— Slight evidence will support a judgment of revocation since the trial court on such a hearing has a wide discretion in considering the evidence against the probationer. *Horton v. State*, 122 Ga. App. 106, 176 S.E.2d 287 (1970).

Only slight evidence is required which need only be sufficient to satisfy the trial judge in exercise of the judge's sound discretion that the defendant has violated the terms of the defendant's probation. *Raines v. State*, 130 Ga. App. 1, 202 S.E.2d 253 (1973).

It is not necessary that evidence support the finding beyond a reasonable doubt or even by a preponderance of the evidence. Only "slight evidence" is required. *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

On probation revocation hearing, slight evidence will be sufficient to support judgment revoking the probationary feature of the sentence. *Hulett v. State*, 150 Ga. App. 367, 258 S.E.2d 48 (1979).

Only slight evidence is necessary to support a finding of a violation of probation. *Jones v. State*, 153 Ga. App. 411, 265 S.E.2d 334 (1980).

There must be some evidence that the defendant violated the terms of the defendant's probated sentence as charged in the notice given the defendant of the revocation hearing. *Young v. State*, 153 Ga. App. 454, 265 S.E.2d 362 (1980).

In determining sufficiency of evidence in probation revocation hearing, the trial judge is not bound by the same rules of evidence as is jury in passing on the guilt or innocence of the accused in the first instance, but has wide discretion and only slight evidence is required to authorize revocation. *Partee v. State*, 155 Ga. App. 662, 272 S.E.2d 528 (1980).

Constitutionality of standard.

— Under the "slight" evidence test, the standard by which the sufficiency of the evidence is determined is not violative of due process in that it is less than that necessary to sustain a conviction. *King v. State*,

Quantum of Proof Needed (Cont'd)
2. Slight Evidence Test (Cont'd)

154 Ga. App. 549, 269 S.E.2d 55 (1980).

Manifest abuse of discretion must be shown for reversal. — When the trial judge finds slight evidence that the conditions of probation have been violated, the judge may through the judge's discretionary power revoke the probation, and such action may not be overturned without a showing that there has been a manifest abuse of discretion. *Hayes v. State*, 157 Ga. App. 659, 278 S.E.2d 424 (1981).

Only slight evidence is required to authorize revocation of probation and when there is even slight evidence of misconduct the appellate court will not interfere with revocation unless there has been a manifest abuse of discretion. *Gamble v. State*, 157 Ga. App. 613, 278 S.E.2d 413 (1981); *Swain v. State*, 157 Ga. App. 868, 278 S.E.2d 743 (1981); *Tinsley v. State*, 159 Ga. App. 579, 284 S.E.2d 84 (1981).

3. Showing of Some Evidence

Appeal of revocation. — Although the trial court on a hearing for the revocation of probation has a wide discretion, and although only slight evidence will support a judgment of revocation, some evidence is required. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

While the trial court has wide discretion in revoking a probated sentence, and while only slight evidence will support a judgment of revocation, some evidence that the defendant violated the terms of the defendant's probated sentence as charged in the notice given the defendant of the revocation hearing is required. *Kendrick v. State*, 125 Ga. App. 326, 187 S.E.2d 580 (1972).

Evidence need not support finding beyond reasonable doubt or even by the preponderance of the evidence but there must be some evidence for the judge to consider as the sole trier of fact. *Wellons v. State*, 144 Ga. App. 218, 240 S.E.2d 768 (1977).

Quantum of evidence necessary to support a probation revocation on appeal is merely that there be some legal evidence to support the finding; when no such evi-

dence exists the decision must be reversed. *Moore v. State*, 155 Ga. App. 299, 270 S.E.2d 713 (1980).

4. Proof Need Not Sustain Criminal Conviction

Proof required. — It is not necessary that the evidence support the finding beyond a reasonable doubt or even by a preponderance of evidence. The judge is the trier of the facts and the judge has a very wide discretion. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

Revocation of probation does not require proof sufficient to sustain a criminal conviction. *Bentley v. State*, 153 Ga. App. 408, 265 S.E.2d 292 (1980).

Revocation of probation does not require proof sufficient to sustain a criminal conviction beyond a reasonable doubt. *Sosbee v. State*, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

Benefit and protection afforded under due process and equal protection clauses of Constitutions have not been violated in that the establishment of the defendant's guilt beyond reasonable doubt is not necessary to justify the revocation of a sentence of probation. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Effect of failure to revoke probation in subsequent criminal trial. — Under subsection (c) of O.C.G.A. § 42-8-38, the revocation or continuance of probation is still within the discretion of the trial court so long as a ruling to revoke is based on at least a preponderance of the evidence, as required by O.C.G.A. § 42-8-34.1(a) (now subsection (b)). The exercise of discretion in declining to revoke probation is not an adjudication of the allegations sufficient to constitute acquittal on the criminal charge forming the basis for the revocation proceeding. *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990).

5. Review of Revocation by Appeals Court

Manifest abuse of discretion by trial court. — Appeals court will not interfere with a revocation unless there has been a manifest abuse of discretion on the part of the trial court. *Sellers v. State*,

107 Ga. App. 516, 130 S.E.2d 790 (1963); *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

When, after notice and hearing, the court revokes the probationary feature of a sentence, and there is some evidence which would indicate that there has been a violation thereof, the Court of Appeals will not interfere unless a manifest abuse of discretion on the part of the trial court appears. *Lankford v. State*, 112 Ga. App. 204, 144 S.E.2d 463 (1965).

When there is any evidence supporting the offense charged as a violation of the probation, an appellate court will not interfere with a revocation unless there has been a manifest abuse of discretion. *Barlow v. State*, 140 Ga. App. 667, 231 S.E.2d 561 (1976); *Clay v. State*, 143 Ga. App. 361, 238 S.E.2d 724 (1977); *Gilbert v. State*, 150 Ga. App. 339, 258 S.E.2d 27 (1979).

Slight evidence of misconduct by trial court. — On hearing to determine whether probation should be revoked, the judge is the sole trier of fact and when there is even slight evidence the appellate court will not interfere with revocation unless there has been an abuse of discretion. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Even when there is slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been a manifest abuse of discretion. *Boston v. State*, 128 Ga. App. 576, 197 S.E.2d 504 (1973); *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975); *Keasler v. State*, 165 Ga. App. 561, 301 S.E.2d 915 (1983).

Evidence sufficient to support finding. — Because only slight evidence is required for revocation of probation any lack of specificity as to the date of the alleged violation in the rule nisi is harmless. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

Slight evidence is sufficient to support a finding of probation revocation and evidence of criminal acts of which a defen-

dant has been acquitted may be used to revoke the defendant's probation. *Kellam v. State*, 154 Ga. App. 561, 269 S.E.2d 493 (1980).

Trial court erred in considering the prior testimony of witnesses who were not shown to be dead, disqualified, or otherwise inaccessible in a probation revocation hearing; nevertheless, any inadmissible hearsay was merely cumulative of the admissible probative testimony which was sufficient to show by a preponderance of the evidence that the defendant committed the offense of aggravated assault. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Evidence Sufficient for Revocation

Testimony of juvenile combined with arresting officer. — Juvenile's testimony that the defendant had broken window of jewelry store by throwing a rock, when added to the testimony of the police officer, who arrested them when the officer drove to the vicinity of the jewelry store after an alarm had gone off, that the officer did not see any other person in the area of the jewelry store except the defendant and the juvenile, under all the circumstances, authorized the court's revocation of probated sentence. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Testimony by police officer posing as drug buyer. — Testimony by a police agent identifying the substance sold the agent by the defendant as marijuana is sufficient to authorize revocation of the defendant's probation. *Smith v. State*, 144 Ga. App. 631, 241 S.E.2d 499 (1978).

Obstruction. — Although the evidence that the probationer made the probationer's arrest warrant unavailable to the officers was circumstantial, the evidence was sufficient to authorize the trial court's finding, by a preponderance of the evidence, that the probationer obstructed the officers. *Carlson v. State*, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007).

Theft by deception. — Evidentiary showing of theft by deception is sufficient

Evidence Sufficient for Revocation (Cont'd)

to authorize the revocation of probation. *McKnight v. State*, 151 Ga. App. 121, 258 S.E.2d 918 (1979).

Evidence Insufficient for Revocation

Charge in notice of arrest without introduction of supporting evidence.

— When notice contained in the special order of arrest charged the defendant with manufacturing illicit whiskey, but no evidence at all was introduced, mere fact that the defendant was operating a truck loaded with sugar, and that the defendant refused to give the name of the purchaser or seller of the sugar and that the defendant had no bill of lading or bill of sale for the sugar, which facts were perfectly consistent with the defendant's contention that the defendant was doing some hauling, was not sufficient to authorize revocation of the probation order. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Requirements as to contents of arrest order. — When notice contained in the order of arrest failed to charge the defendant with a violation of that provision of the probation order prohibiting the defendant from leaving the state without permission, the mere fact that the defendant was stopped in Alabama was not a sufficient ground for revocation. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Probation may not be revoked when there is no evidence the defendant violated its terms in the manner charged in the notice, even though there may be evidence at the hearing that the defendant violated the terms of probation in some other manner as to which no notice was given. *Horton v. State*, 122 Ga. App. 106, 176 S.E.2d 287 (1970).

Failure of state to prove reliability of drug test. — Revocation of probation based on the defendant's failure of a drug test was error when the test result lacked probative value since no expert testimony was offered by the state to prove the scientific reliability of the ontrack system as used for the purpose of drug detection.

Bowen v. State, 242 Ga. App. 631, 531 S.E.2d 104 (2000).

Computation of and Credit for Time Served

Crediting of probation toward imprisonment. — When probationer is sentenced to serve time in penal institution for offense for which the probationer has spent time on probation, that the probation time must be credited to any sentence received, including cases involving first offender probation. *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980); *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

In the case of the defendant who was convicted and sentenced for child molestation, a resentencing order requiring the defendant to serve a total of 13 years — five to be served in prison beyond the three already served on probation, to be followed by an additional five years on probation — was not error because the defendant was resentenced within the maximum sentence allowable by law, the defendant was clearly advised of this possibility, and the court credited the time already served on probation. *Roland v. Meadows*, 273 Ga. 857, 548 S.E.2d 289 (2001).

Trial court did not err in granting summary judgment to the defendants in an inmate's action alleging that the inmate, who had violated probation, was imprisoned for longer than allowed as O.C.G.A. § 42-8-38 did not require the inmate's pre-revocation of probation jail time to be credited toward the inmate's sentence in a manner that would reduce the overall time served (either on probation or in confinement) to something less than the 10 years for which the inmate was sentenced. *Stallings v. Sparks*, 314 Ga. App. 216, 723 S.E.2d 514 (2012).

Crediting of imprisonment time pending final disposition of revocation petition. — Since the trial court can order execution of sentence originally imposed, the probationer is entitled to assert that periods of imprisonment prior to final disposition of the prisoner's revocation petition must be counted toward that original sentence, and the order of revocation cannot result in the execution of a longer

sentence than was originally imposed. *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

Since the trial court cannot, under O.C.G.A. §§ 17-10-1 and 42-8-38, increase sentence originally passed, period of time probationer serves in jail prior to final disposition of the probationer's revocation proceeding is credited as time served on original sentence and thus limits the permissible parameters of the trial court's power to revoke. *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

Probationer imprisoned and awaiting final determination of whether the probationer violated probation and what part of the probationer's original sentence should be executed is not serving that part of the probationer's sentence which is subsequently ordered executed when violation is found. During this period, the probationer is continuing to serve the probated part of the probationer's sentence prior to final disposition of the revocation petition. Such periods do not suspend the running of the original sentence received and the probationer is entitled to assert that those periods pending a determination of probation revocation are, in effect, served under probation and shall be considered as time served and shall be deducted from and considered a part of the time the probationer was originally sentenced to serve. *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

No credit for time served awaiting hearing. — Time served by probationers incarcerated while awaiting a probation revocation hearing will not be credited toward any sentence imposed upon the probationers at such hearing. *Penney v. State*, 157 Ga. App. 737, 278 S.E.2d 460 (1981).

Service of suspended sentence cannot exceed maximum confinement sentence. — Once service of suspended sentence begins, either by incarceration or probation, it cannot exceed maximum sentence of confinement which could have been imposed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

Increase of original sentence prohibited. — While under former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) the trial court did have juris-

diction to change or modify the terms of the original sentence, the court cannot, under former Code 1933, § 27-2502 and Ga. L. 1956, p. 27, § 12 (see now O.C.G.A. §§ 17-10-1 and 42-8-38), increase the sentence originally passed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

After the defendant violated the terms of the defendant's probation, the court could not impose the maximum sentence without giving the defendant credit for time served on probation since to do so would impose a sentence exceeding the maximum allowed by law. *Franklin v. State*, 236 Ga. App. 401, 512 S.E.2d 304 (1999).

The revoking court may not increase the original sentence. Thus the language "modify or change" in former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34) was limited by Ga. L. 1966, p. 440, § 1 (see now O.C.G.A. § 42-8-38). *England v. Newton*, 238 Ga. 534, 233 S.E.2d 787 (1977).

When, after the original suspended sentence in a bastardy proceeding was entered in 1968, the court held a hearing in 1974 and ordered child support payments to include medical bills, and certain arrearage caught up as conditions of probation, and a second post-sentence hearing was held in 1978, at a time when the defendant was not in arrears under either of the prior orders, the purpose of the hearing being for reconsideration of the terms of the defendant's suspended sentence, after which the defendant's weekly payments were increased from \$12.50 to \$25.00, the effect was to increase the terms of the sentence originally passed and as such it was illegal. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

Decisions Under Prior Law

1. Decisions Under Code 1933, § 27-2702

Deduction of probation served from subsequent imprisonment. — One serving sentence on probation is fulfilling sentence as effectually as if confined in jail or on chain gang, and accordingly, if after a hearing the order granting

Decisions Under Prior Law (Cont'd)**1. Decisions Under Code 1933,****§ 27-2702 (Cont'd)**

such probation is revoked, the time served by the defendant before the revocation must be counted in the defendant's favor and deducted from the period of service imposed. *Roper v. Mallard*, 193 Ga. 684, 19 S.E.2d 525 (1942).

Discretion of judge to suspend or probate sentence. — Judge imposing sentence is granted power to suspend or probate the sentence under such rules and regulations as the judge thinks proper. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

Judge has the right and authority to revoke the suspension or probation, after notice and a hearing, when the defendant violates any of the rules and regulations prescribed by the court. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957).

Notice and hearing required for revocation. — When a probation sentence is given, the trial judge is without authority to reserve the right to revoke the sentence without notice or hearing. *Balkcom v. Gunn*, 206 Ga. 167, 56 S.E.2d 482 (1949).

Judge has the right and authority to revoke suspension or probation, after notice and a hearing, when the defendant violates any of the rules and regulations prescribed by the court. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

Violation of prescribed rules required for incarceration. — When no rules or regulations are prescribed, and no violation of a prescribed rule or regulation is alleged, the court is without authority to order the defendant incarcerated upon the theory that one has violated the terms and conditions of a probation sentence. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951); *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957).

2. Decisions Under Code 1933,**§ 27-2705**

Right to hearing. — Probationer has right to notice and hearing upon question of revocation, and an order of revocation without a hearing is void. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925).

Requirement of and meaning of "due examination." — It was general practice in Georgia for a warrant to be issued by a court on a written petition calling to the court's attention the alleged delinquency of a probationer, but the only requirement was that the defendant receive "due examination," which means that the defendant be given notice and an opportunity to be heard, and there being no requirement that the proceeding be initiated by written petition of the solicitor general (now district attorney), technical defects in such a petition when filed would not vitiate the warrant issued by the court or subsequent proceedings thereon, provided the requirements of notice and opportunity to be heard are complied with. *Jackson v. State*, 91 Ga. App. 291, 85 S.E.2d 444 (1954), overruled on other grounds, *Jackson v. Jones*, 254 Ga. 127, 327 S.E.2d 206 (1985).

Effect of deprivation of liberty without giving notice and hearing. — To deprive a defendant of the defendant's liberty upon the theory that the defendant has violated any of the rules and regulations prescribed in a suspended or probated sentence without giving the defendant notice and opportunity to be heard upon the question of whether or not the defendant has violated such rules and regulations, would violate one of the fundamental tenets that a person shall not be deprived of the defendant's liberty without due process of law, which includes notice and an opportunity to be heard. *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951).

Review of revocation by appeals court. — When, after due examination, the court revokes the court's order to the probationer to serve the remainder of the probationer's sentence outside the confines of the chain gang, jail, or other place of detention, Court of Appeals will not interfere unless a manifest abuse of discretion on the part of the lower court appears. *Brown v. State*, 71 Ga. App. 303, 30 S.E.2d 783 (1944).

Court of Appeals will not interfere unless a manifest abuse of discretion appears. *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949); *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

Discretion of judge. — Discretion of the judge in revoking probation will not be interfered with unless grossly abused. *Olsen v. State*, 21 Ga. App. 795, 95 S.E. 269 (1918); *Towns v. State*, 25 Ga. App. 419, 103 S.E. 724 (1920).

Judge is the trier of the facts in a case for the revocation of probation and has very wide discretion and unless a manifest abuse of such discretion on the part of the lower court appears, the appellate court will not interfere. *Alewine v. State*, 79 Ga. App. 779, 54 S.E.2d 507 (1949).

Leaving jurisdiction of court is ground for revocation. See *Shamblin v. Penn*, 148 Ga. 592, 97 S.E. 520 (1918).

Quantum of evidence needed to revoke probation. — Degree of evidence necessary to convict in a criminal case being that which convinces the jury of the guilt of the defendant beyond a reasonable doubt, and the degree necessary to support the revocation of a probation sentence being only some evidence that the defendant has violated the conditions of the probation, which satisfies the trial court hearing the case in the exercise of a very wide discretion — it is not necessary to show that the defendant has been convicted of the act constituting the condition of the probation; the sole issue before the trial court is that of whether or not the defendant has committed the act. *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

Standard of certainty for establishing violation of conditions. — Violation of the conditions of probation must be established with reasonable certainty so as to satisfy the conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. In such a hearing if the evidence inclines a reasonable and impartial mind to the belief that the defendant violated the terms of the defendant's probation, it is sufficient. *Sparks v. State*, 77 Ga. App. 22, 47 S.E.2d 678 (1948).

Violation of probation condition determinative for revocation. — It is not the record of conviction, but the fact of guilt of violation of a condition of probation, which determines whether probation should be revoked, and in determining this question the trial judge is not bound

by the same rules of evidence as a jury in passing upon the guilt or innocence of the accused in the first instance. It is not necessary that the evidence support the finding beyond a reasonable doubt or even by a preponderance of the evidence; the judge is the trier of the facts, and the judge has a very wide discretion. *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

Judge conducting proceeding personally. — It is not improper for the trial judge to issue an order or warrant for the arrest of the probationer and to conduct the proceeding personally. *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949).

When presumption of proper notice and opportunity to be heard invoked. — When a probationer is arrested on an order of the trial court directing that the probationer be placed in custody until a given date and then brought before the court for examination to determine the issue of whether or not the probationer's probation shall be revoked, and such probationer is brought before the court under arrest at the time and place specified, and counsel for the probationer also appears and represents the probationer at the hearing, it will be presumed that the probationer had proper notice and ample opportunity to be heard, it not appearing that counsel made any motion for a continuance to allow additional time to prepare the defense. *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949).

Quantum of evidence necessary for revocation. — Under the provisions of former Code 1933, § 27-2705, the examination of the defendant to determine whether the defendant has violated the conditions of the defendant's probation is conducted by the court without a jury, and the quantum of evidence necessary to convince the court that a criminal act authorizing revocation has been committed is different from that on a trial of the defendant for such offense under an indictment charging the defendant therewith. *Price v. State*, 91 Ga. App. 381, 85 S.E.2d 627 (1955).

Probationer entitled to fair treatment. — While probation is matter of grace, probationer is entitled to fair treatment and not to be made the victim of

Decisions Under Prior Law (Cont'd)**2. Decisions Under Code 1933,****§ 27-2705 (Cont'd)**

baseless impression or caprice. Sparks v. State, 77 Ga. App. 22, 47 S.E.2d 678 (1948).

Effect on defendant's sentence of not prescribing rules and regulations. — To deprive a defendant of the defendant's liberty upon the theory that the defendant has violated rules and regulations prescribed in the defendant's sentence, when no rules, regulations, conditions, limitations, or restrictions were imposed by such sentence, would deprive the defendant of "due process of law." Cross v. Huff, 208 Ga. 392, 67 S.E.2d 124 (1951).

Sentence held to be too vague. — When sentence on charge of abandonment did not specify whether payments required were in the nature of fine or as payments for the support of the defendant's child or children, and failed to specify where or to whom the payments were to be made, this provision of the sentence was too vague and indefinite to be enforceable, and a revocation of the probation sentence solely on the ground that the defendant did not make the payments specified was without authority of law. Guest v. State, 87 Ga. App. 184, 73 S.E.2d 218 (1952).

Ambiguous sentence construed in favor of defendant. — Sentence which is, in its entirety, ambiguous and doubtful should be given that construction which favors the liberty of the individual; sentences in criminal cases to be strictly construed, and, on a hearing of an issue made by motion to revoke a probation sentence on the theory that certain rules and regulations prescribed therein have been violated, it must appear that the rules were in fact prescribed with definiteness and certainty in the sentence, and that there has been an infraction thereof, since to deprive the prisoner of the defendant's liberty otherwise would be a violation of due process. Guest v. State, 87 Ga. App. 184, 73 S.E.2d 218 (1952).

Refusal to discharge upon habeas corpus not error. — Since the original probation was void, it was not error to refuse to discharge defendant upon writ of habeas corpus. Shamblin v. Penn, 148 Ga. 592, 97 S.E. 520 (1918); Roberts v. Lowry, 160 Ga. 494, 128 S.E. 746 (1925).

Revocation order not final judgment. — Order revoking probationer's parole was not such a final judgment as was subject to review under Art. 2, Ch. 6, T. 5. Antonopoulos v. State, 151 Ga. 466, 107 S.E. 156 (1921); Troup v. State, 27 Ga. App. 636, 109 S.E. 681 (1921); Jackson v. State, 27 Ga. App. 648, 110 S.E. 423 (1921).

OPINIONS OF THE ATTORNEY GENERAL

Affidavit required for arrest of probation violator. — Valid warrant for arrest of probation violator must be accompanied by affidavit, and to be valid, the affidavit must be sworn to under oath and signed by affiant. 1981 Op. Att'y Gen. No. 81-99.

Arrest of probationer without warrant. — If a probation violator is arrested without a warrant, it would be incumbent upon the probation supervisor or other arresting officer to procure a warrant within the 48-hour period of time specified in O.C.G.A. § 17-4-62. 1988 Op. Att'y Gen. No. U88-14.

Personal knowledge of affiant. — Affiant need not have personal knowledge of information to which the affiant swears

when executing affidavit for arrest of probation violator. 1981 Op. Att'y Gen. No. 81-99.

Where hearing held. — Probation violator may be returned to sentencing court for hearing or the violator may have hearing in court of equivalent original criminal jurisdiction within county wherein probationer resides for purposes of supervision upon the giving of ten days' written notice to the sentencing court prior to the hearing on the merits. 1965-66 Op. Att'y Gen. No. 66-257.

Fingerprinting of offenders. — This offense is one for which those charged with a violation are to be fingerprinted. 1996 Op. Att'y Gen. No. 96-17.

Offense under O.C.G.A. § 42-8-38 re-

quires fingerprinting only in those instances in which an adverse action is taken against the probationer such that the adverse action actually alters the terms of his or her probation. 1998 Op. Att'y Gen. No. 98-20.

Revocation only by circuit imposing probation. — Only the circuit imposing first offender probation may revoke that period of probation, even though supervision has been transferred to another judicial circuit. 1980 Op. Att'y Gen. No. 80-79.

Violation committed subsequent to imposition of sentence. — Probated sentence may be revoked if the sentence being revoked is in effect and being served at the time the order of revocation is made, even if the act constituting the violation was committed prior to the commencement of service of the probated sentence; provided that the violation was committed subsequent to the imposition of sentence. 1974 Op. Att'y Gen. No. U74-107.

Acceptance into state penal system. — Once a court revokes probation and orders serving of sentence, the clerk sends notice to Board of Offender Rehabilitation (Corrections) and the state has an obligation to accept such persons into the state penal system. 1982 Op. Att'y Gen. No. 82-33.

Collection of funds for suspended sentences. — Upon proper court order, the probation officers would be authorized to collect funds made payable in connection with suspended sentences. 1963-65 Op. Att'y Gen. p. 4.

Issuance of warrant against probationer. — Issuance of warrant against person serving probated sentence does not stop running of time of the probated sentence; if probated sentence is revoked pursuant to the provisions for a hearing and judicial determination as set forth by this section, then the length of time to be served on the original sentence shall be time of sentence remaining after deduction is made for time which the probationer served under probation. 1967 Op. Att'y Gen. No. 67-391.

Crediting probation time toward imprisonment. — Upon revocation of probated sentence, offender cannot be re-

turned to confinement for period of time in excess of original probationary period. 1974 Op. Att'y Gen. No. U74-107.

Crediting time served outside prison upon revocation. — This section does not mean that in every case when probation is revoked, without more, the prisoner is not to receive credit for the time served outside the confines of the jail or prison, but it was the intention of the General Assembly that the judge revoking probation have the power to either give or deny such credit; it, therefore, is necessary to refer to the language of the order revoking probation. 1957 Op. Att'y Gen. p. 201.

Crediting confinement period after revocation. — After revocation of probated sentence, in determining remaining balance of the sentence, the defendant is credited with the time on probation; however, to prevent the defendant from receiving double credit for this time, jail time credit should not be awarded toward the period of confinement ordered after revocation of a probated sentence. 1973 Op. Att'y Gen. No. 73-1.

Ambiguous orders granting credit to be construed in prisoner's favor. — When order revoking probation is ambiguous with respect to whether prisoner should or should not receive credit for time served outside prison, it would be necessary to give credit for such time, under the rulings that an order of probation, and the order revoking the probation, is a part of the sentence and in cases of ambiguity, a sentence is to be construed so as to give the benefit of the doubt to the accused. 1957 Op. Att'y Gen. p. 201.

Credit for time after revocation. — For discussion of the effect of *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980), which decided whether, upon revocation of probation entered under the terms of the First Offender Act, O.C.G.A. § 42-8-60, a criminal defendant was entitled to credit for time already spent on first offender probation, see 1983 Op. Att'y Gen. No. 83-6.

Running of sentence imposed subsequent to probation. — Sentence imposed subsequent to revocation of first offender probation should run from the date that sentence is imposed. 1976 Op. Att'y Gen. No. 76-16.

Running of probation preceded by imprisonment. — Probated sentence preceded by term of imprisonment begins

upon offender's fulfillment, including parole supervision, of the imprisonment obligation. 1974 Op. Att'y Gen. No. U74-107.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

Propriety, in imposing sentence for original offense after revocation of probation, of considering acts because of which probation was revoked, 65 ALR3d 1100.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

Propriety of revocation of probation for subsequent criminal conviction which is subject to appeal, 76 ALR3d 588.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 77 ALR3d 636.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of Miranda rule, 77 ALR3d 669.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 ALR3d 781.

Admissibility of hearsay evidence in probation revocation hearings, 11 ALR4th 999.

Power of court, after expiration of probation term, to revoke or modify probation for violations committed during the probation term, 13 ALR4th 1240.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 ALR4th 755.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation, 24 ALR4th 789.

Probation revocation: insanity as defense, 56 ALR4th 1178.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 ALR5th 262.

42-8-39. Suspension of sentence does not place defendant on probation.

In all criminal cases in which the defendant is found guilty or in which a plea of guilty or of nolo contendere is entered and in which the trial judge after imposing sentence further provides that the execution of the sentence shall be suspended, such provision shall not have the effect of placing the defendant on probation as provided in this article. (Ga. L. 1956, p. 27, § 13; Ga. L. 1960, p. 1148, § 2; Ga. L. 1965, p. 413, § 4.)

JUDICIAL DECISIONS

Comparison to other sections. — Ga. L. 1965, p. 413, § 4 (see now O.C.G.A. § 42-8-39) dealt with the effect of suspended sentences while former Code 1933, §§ 27-2502 and 27-2506.1 (see now O.C.G.A. §§ 17-10-1 and 17-10-4) dealt

with authority to impose the sentences. Cross v. State, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

Authorized conditions. — Condition which would be authorized in the case of a probated sentence would be authorized in

the case of a suspended sentence. *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970).

Effect of amendment. — This section was amended to specify that suspended sentences not come under this article, but it did not provide any change allowing the court to suspend sentences. *Cross v. State*, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

Suspension upon condition did not amount to probation. — Suspension of a convicted drunk driver's sentence upon condition that the driver not drive for 120 days did not have the effect of placing the driver on probation since the driver's driver's license was automatically suspended for 120 days. *Williams v. State*, 191 Ga. App. 217, 381 S.E.2d 399 (1989).

Distinguishing length of service for suspended and probated sentences. — Court may, at the time of sentencing, specify the amount to be paid by the parent for the support of the minor child and may suspend the service of the sentence pending the minority of the child. When the child reaches majority, the sen-

tence of course is at an end. However, service of any sentence so suspended in abandonment cases may be ordered at any time before the child reaches the age of 21. However, when a sentence is merely probated, the probationary feature of the sentence ends when the elapsed time equals the maximum sentence of confinement which could have been imposed. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

Abuse of discretion by court. — Trial court abuses the court's discretion when the court places a case on the dead docket over the defendant's objection. *Newman v. State*, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

Cited in *Todd v. State*, 107 Ga. App. 771, 131 S.E.2d 201 (1963); *Rowland v. State*, 120 Ga. App. 248, 170 S.E.2d 58 (1969); *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970); *Jones v. State*, 154 Ga. App. 581, 269 S.E.2d 77 (1980); *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001).

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Running of suspended sentence conditioned on payment of fine. — Suspended sentence conditioned on payment of fine does not begin to run if fine is not paid until state or defendant initiates action to have suspension revoked. 1981 Op. Att'y Gen. No. U81-42.

Effect of suspension of part of sentence. — In the imposition of a sentence, if the trial court suspends service of part of sentence, the provision for suspension shall not have the effect of placing the defendant on probation; thus, once a probated sentence is revoked and the probationer has been sentenced to a definite period of years of imprisonment and the remainder of the defendant's sentence has been suspended, this sentence does not have the effect of placing the defendant on probation and, therefore, such sentence

cannot be revoked. 1968 Op. Att'y Gen. No. 68-165.

Modification of original sentence upon probation. — When a prisoner is placed on probation, the original sentence is subject to modification by the rendering court at any time during the period of probation; the judge imposing sentence is granted the power and authority to revoke suspension or probation when the defendant has violated any of the rules or regulations prescribed by the court. 1968 Op. Att'y Gen. No. 68-165.

Remanding offender to prison upon suspension of sentence. — State Board of Pardons and Paroles cannot remand offender to prison when sentence has been suspended by court. 1963-65 Op. Att'y Gen. p. 36.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 1975, 2144-2161.

ALR. — What constitutes “good behavior” within statute or judicial order expressly conditioning suspension of sentence thereon, 58 ALR3d 1156.

Pretrial diversion: statute or court rule authorizing suspension or dismissal of

criminal prosecution on defendant’s consent to noncriminal alternative, 4 ALR4th 147.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

42-8-40. Confidentiality of papers; exemption from subpoena; declassification; limited use by personnel.

(a) Except as provided in subsection (b) of this Code section, all reports, files, records, and papers of whatever kind relative to the state-wide probation system are declared to be confidential and shall be available only to the probation system officials and to the judge handling a particular case. They shall not be subject to process of subpoena. However, the commissioner may by written order declassify any such records.

(b) Supervision records of the State Board of Pardons and Paroles may be made available to officials employed with the state-wide probation system, provided that the same shall remain confidential and not available to any other person or subject to subpoena unless declassified by the State Board of Pardons and Paroles. (Ga. L. 1956, p. 27, § 19; Ga. L. 1958, p. 15, § 11; Ga. L. 2003, p. 421, § 1; Ga. L. 2011, p. 620, § 1/SB 214.)

Cross references. — Inspection of public records generally, § 50-18-70 et seq.

JUDICIAL DECISIONS

Applicability to presentence investigation reports. — This section applies to presentence investigation reports. *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979).

Right to verbatim copy of presentence report. — Defendant has no constitutional right to a verbatim copy of the presentence investigation report for use in sentence review process. Hence, this section is not unconstitutional on the ground the statute prohibits a defendant from obtaining access to the report. *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979).

Right to compulsory process. — O.C.G.A. § 42-8-40 unconstitutionally limited a criminal defendant’s constitutional right to compulsory process when the statute was applied to prevent the

defendant obtaining a copy of the results of a drug test in order to put forth a defense in a criminal trial. *Dean v. State*, 267 Ga. 306, 477 S.E.2d 573 (1996).

Revealing presentence report to counsel. — If a presentence probation report contains any matter adverse to the defendant and likely to influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976).

Refreshing recollection with confidential presentence investigation report. — In a proceeding to terminate the parental rights of a father who had been convicted of molesting his children, the

trial court did not err in allowing a probation official to use a confidential presentence investigation report to refresh his recollection about interviews he had with the father. *In re S.M.L.*, 228 Ga. App. 81, 491 S.E.2d 186 (1997).

Testimony relating to confidential records and petitions barred. — When

records and petitions to revoke probation have been declared confidential and not subject to process of subpoena by statute, the trial court in probation revocation hearing does not err in refusing to admit testimony relating to them. *Penney v. State*, 157 Ga. App. 737, 278 S.E.2d 460 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 ALR5th 660.

42-8-41. Cooperation of state and local entities with probation officials.

All state and local departments, agencies, boards, bureaus, commissions, and committees shall cooperate with the probation officials. (Ga. L. 1956, p. 27, § 17.)

42-8-42. Provision of office space and clerical help by department and counties.

The department may provide office space and clerical help wherever needed. The counties of this state shall cooperate in this respect and, wherever possible, shall furnish office space if needed. (Ga. L. 1956, p. 27, § 18.)

42-8-43. Effect of article on existing county probation systems.

Except as otherwise provided by law, any county probation system in existence on February 8, 1956, shall not be affected by the passage of this article, regardless of whether the law under which the system exists is specifically repealed by this article. The personnel of the system shall continue to be appointed and employed under the same procedure as used prior to February 8, 1956, and the system shall be financed under the same method as it was financed prior to February 8, 1956. However, the substantive provisions of this article relative to probation shall be followed, and to this end any probation officer of such system shall be deemed to be the same as a probation supervisor, with the probation supervisor assigned by the department serving in a liaison capacity between the county probation system and the department. (Ga. L. 1956, p. 27, § 15; Ga. L. 1972, p. 604, § 11.)

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Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 27-2703, prior to revision by Ga. L. 1956, p. 27, § 15 are included in the annotations for this Code section.

Authority for appointment of probation officers. — When, in a petition for mandamus to compel the payment of salary of a probation officer, the petition enumerates specified grand jury recommendations for the appointment of such officers, and sets forth in chronological order the appointments made by the judge in pursuance thereto, and when the appointment of the petitioner is shown to have been made at a time when the number of such officers authorized by the grand jury had not been filled by appointments of the judge, there was authority for the appointment of the probation officers. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946) (decided under former Code 1933, § 27-2703).

Grand jury's intent must be clear and understandable. — When, by an Act of the legislature, an office is created to become effective and operative upon the recommendation of the grand jury, no particular form or language is required in the presentments so long as the intent of the grand jury's recommendation is clear and understandable. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946) (decided under former Code 1933, § 27-2703).

Creation of office of probation officer. — Upon recommendation of grand jury, the office of probation officer became operative and legally existed, even though no one was appointed thereto, and the appointment of the official became mandatory upon the judge. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946) (decided under former Code 1933, § 27-2703).

Salary of probation officer. — When properly appointed to office with a salary fixed, a probation officer is entitled to the officer's salary, whether or not the officer performs the duties of the office. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946) (decided under former Code 1933, § 27-2703).

Vacancy in probation office. — Fact that the office of probation officer is not being filled by anyone does not nullify the legal existence of the office. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946) (decided under former Code 1933, § 27-2703).

Assistant probation officers. — Assistant probation officers appointed by judges of the superior court are answerable only to the court making the appointment, and serve at the pleasure of such court. Such persons are not county officers, nor are they county employees, as all county officers and employees have duties to perform that relate to powers delegated to the counties. *Civil Serv. Bd. v. MacNeill*, 201 Ga. 643, 40 S.E.2d 655 (1946) (decided under former Code 1933, § 27-2703).

OPINIONS OF THE ATTORNEY GENERAL

Systems cannot be converted into private operations. — Any remaining county probation systems cannot be con-

verted into a system operated by a private corporation without legislative authority. 1989 Op. Att'y Gen. No. U89-8.

42-8-43.1. Participation in cost of county probation systems; merging of county systems into state system.

(a) This Code section shall apply to county probation systems of all counties of this state having a population of 400,000 or more according to the United States decennial census of 1980 or any future such census, any provision of Code Section 42-8-43 to the contrary notwithstanding. The department shall participate in the cost of the county probation systems subject to this Code section for fiscal years 1982-83

and 1983-84. The department shall compute the state cost per probationer on a state-wide basis for each of the aforesaid fiscal years pursuant to the formula used by the Office of Planning and Budget to determine the state cost for probation for budgetary purposes. For each of the aforesaid fiscal years, the department shall pay to the governing authority of each county maintaining a county probation system subject to this Code section the percentage shown below of the state-wide cost per probationer for each probationer being supervised under the respective county probation system as of the first day of each of said fiscal years:

- (1) For fiscal year 1982-83, 10 percent; and
- (2) For fiscal year 1983-84, 10-100 percent.

(b) The funds necessary to participate in the cost of county probation systems under subsection (a) of this Code section shall come from funds appropriated to the department for the purposes of providing state participation in the cost of county probation systems. The payments to counties provided for in subsection (a) of this Code section shall be made by, or pursuant to the order of, the department in single lump sum payment for each fiscal year, with the payment for fiscal year 1982-83 being made by May 1, 1983, and the one for fiscal year 1983-84 by May 1, 1984. As a condition necessary for a county to qualify for department participation in the cost of the county's probation system, the employees of such county probation systems shall be subject to the supervision, control, and direction of the department.

(c) Each county probation system subject to the provisions of this Code section shall become a part of the state-wide probation system provided for by this article effective on July 1, 1984, and shall be fully funded from state funds as a part of the state-wide probation system beginning with fiscal year 1984-85. The employees of said county probation systems, at their option, shall become employees of the department on the date said county systems become a part of the state-wide probation system and, on or after said date, said employees shall be subject to the salary schedules and other personnel policies of the department, except that the salaries of such employees shall not be reduced as a result of becoming employees of the department.

(d) When an employee of a county probation system of any county of this state having a population of 550,000 or more according to the United States decennial census of 1980 or any future such census becomes an employee of the department pursuant to subsection (c) of this Code section at the same or a greater salary, the change in employment shall not constitute involuntary separation from service or termination of employment within the meaning of any local retirement or pension system of which the employee was a member at the time of

such change in employment, and the change in employment shall not entitle the employee to begin receiving any retirement or pension benefit whatsoever under any such local retirement or pension system. (Code 1981, § 42-8-43.1, enacted by Ga. L. 1982, p. 1605, § 1; Ga. L. 1983, p. 421, § 1.)

Editor's notes. — Ga. L. 1982, p. 1605, § 2, not codified by the General Assembly, provided that if either a local Act or a general law of local application were adopted and became effective on or before April 1, 1983, expressing approval that a county probation system affected by this Code section become part of the state-wide probation system in accordance with this Code section, then this Code section would become effective on April 1, 1983, as to county probation systems affected by it.

Ga. L. 1982, p. 5099, § 1 expressed such approval as to counties with a population of 550,000 or more, according to the United States decennial census of 1980 or any future such census, and declared that any county affected by it approves its county probation system becoming part of the state-wide probation system in accordance with this Code section. Ga. L. 1983, p. 3982, § 1, effective March 14, 1983, expressed such approval for the county probation system of DeKalb County.

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Retirement by operation of law. — Since the General Assembly provided that, upon takeover of a county probation system by the state system, the employees of the county system could at their option become employees of the state system performing the same duties without a reduction in salary and could continue participation in their county pension plans, the employees were not retired by operation of law under their pension plans. *Barnett v. Fulton County*, 255 Ga. 419, 339 S.E.2d 236 (1986).

Probation as part of Department of Corrections. — Since the probation office was part of the Department of Corrections under O.C.G.A. § 42-8-43.1, the district court properly dismissed the probationer's claims against the probation office as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i). A suit against the probation office was barred by the Eleventh Amendment. *Lovelace v. Dekalb Cent. Prob.*, 2005 U.S. App. LEXIS 16090 (11th Cir. Aug. 3, 2005) (Unpublished).

OPINIONS OF THE ATTORNEY GENERAL

Supervision of probationers. — Probation Division of the Department of Offender Rehabilitation (Corrections) is responsible for supervising persons who have received probated sentences from the Traffic Court of the City of Atlanta. 1984 Op. Att'y Gen. No. 84-41.

Seniority of employees becoming state employees. — County employee who becomes a state employee pursuant to O.C.G.A. § 42-8-43.1 will have whatever seniority is authorized by the Rules and Regulations of the State Personnel Board so long as the employee's salary is

not reduced. 1984 Op. Att'y Gen. No. 84-38.

Transfer of accrued personal leave by employees. — No leave accrued by a county employee under a county personnel system can be transferred when the employee becomes a state employee since assumption of such leave by the state would be a gratuity prohibited by Ga. Const. 1983, Art. III, Sec. VI, Para. VI and would violate Ga. Const. 1983, Art. VII, Sec. IV, Para. X, which prohibits the assumption of any debt owed by the county. 1984 Op. Att'y Gen. No. 84-38.

42-8-43.2. Payments by state to county probation systems; merger of county systems into state-wide system.

(a) This Code section shall apply to county probation systems, including state court adult probation systems, of each county having a population of more than 100,000 in any metropolitan statistical area having a population of not less than 200,000 nor more than 230,000 according to the United States decennial census of 1980 or any future such census, any provision of Code Section 42-8-43 to the contrary notwithstanding. The department shall participate in the cost of the county probation systems subject to this Code section for fiscal year 1987-88. The department shall compute the state cost per probationer on a state-wide basis for such fiscal year pursuant to the formula used by the Office of Planning and Budget to determine the state cost for probation for budgetary purposes. For said fiscal year, the department shall pay to the governing authority of each county maintaining a county probation system subject to this Code section 10 percent of the state-wide cost per probationer for each probationer being supervised under the respective county probation system as of the first day of said fiscal year. The funds necessary to participate in the cost of county probation systems under this subsection shall come from funds appropriated to the department for the purposes of providing state participation in the cost of county probation systems. The payments to counties provided for in this subsection shall be made by, or pursuant to the order of, the department in single lump sum payment for fiscal year 1987-88, with the payment being made by May 1, 1988. As a condition necessary for a county to qualify for department participation in the cost of the county's probation system, the county shall cause to be made an independent audit of the financial affairs and transactions of all funds and activities of the county probation system and agree to be responsible for any discrepancies, obligations, debts, or liabilities of such county probation system which may exist prior to the department's participation in the cost of the county's probation system. As a further condition necessary for a county to qualify for department participation in the cost of the county's probation system, the employees of such county probation systems shall be subject to the supervision, control, and direction of the department.

(b) The county probation system of any such county shall become a part of the state-wide probation system provided for by this article effective July 1, 1988, and shall be fully funded from state funds as part of the state-wide probation system beginning with fiscal year 1988-89. The employees of such county probation system, at their option, shall become employees of the department on the date said county system becomes a part of the state-wide probation system and, on or after said date, said employees shall be subject to the salary schedules and other

personnel policies of the department, except that the salaries of such employees shall not be reduced as a result of becoming employees of the department.

(c) When an employee of a county probation system becomes an employee of the department pursuant to subsection (b) of this Code section at the same or a greater salary, the change in employment shall not constitute involuntary separation from service or termination of employment within the meaning of any local retirement or pension system of which the employee was a member at the time of such change in employment, and the change in employment shall not entitle the employee to begin receiving any retirement or pension benefit whatsoever under any such local retirement or pension system.

(d) No leave time accrued by an employee of a county probation system shall be transferred when the employee becomes a state employee. Any leave time accrued by an employee of such county probation system shall be satisfied as a debt owed to the employee by the county. (Code 1981, § 42-8-43.2, enacted by Ga. L. 1987, p. 1319, § 1.)

Editor's notes. — Ga. L. 1987, p. 1319, § 2, not codified by the General Assembly, provided that state funding under that Act shall not commence until fiscal year 1987-1988.

42-8-43.3. Participation in cost of county probation systems in counties with population of 250,000 or more.

(a) This Code section shall apply to county probation systems, including state court adult probation systems, of each county having a population of 250,000 or more according to the United States decennial census of 1980 or any future such census, any provision of Code Section 42-8-43 to the contrary notwithstanding. The department shall participate in the cost of the county probation systems subject to this Code section for fiscal year 1988-89. For said fiscal year, the department shall pay to the governing authority of each county maintaining a county probation system subject to this Code section 10 percent of the annual county probation system budget as of the first day of said fiscal year. The funds necessary to participate in the cost of county probation systems under this subsection shall come from funds appropriated to the department for the purposes of providing state participation in the cost of county probation systems. The payments to counties provided for in this subsection shall be made by, or pursuant to the order of, the department in single lump sum payment for fiscal year 1988-89, with the payment being made by May 1, 1989. As a condition necessary for a county to qualify for department participation in the cost of the county's probation system, the county shall cause to be made an independent audit of the financial affairs and transactions of all funds

and activities of the county probation system and agree to be responsible for any discrepancies, obligations, debts, or liabilities of such county probation system which may exist prior to the department's participation in the cost of the county's probation system. As a further condition necessary for a county to qualify for department participation in the cost of the county's probation system, the employees of such county probation systems shall be subject to the supervision, control, and direction of the department.

(b) The county probation system of any such county shall become a part of the state-wide probation system provided for by this article effective July 1, 1989, and shall be fully funded from state funds as part of the state-wide probation system beginning with fiscal year 1989-90. The employees of such county probation system, at their option, shall become employees of the department on the date said county system becomes a part of the state-wide probation system and, on or after said date, said employees shall be subject to the salary schedules and other personnel policies of the department, except that the salaries of such employees shall not be reduced as a result of becoming employees of the department.

(c) When an employee of a county probation system becomes an employee of the department pursuant to subsection (b) of this Code section at the same or a greater salary, the change in employment shall not constitute involuntary separation from service or termination of employment within the meaning of any local retirement or pension system of which the employee was a member at the time of such change in employment, and the change in employment shall not entitle the employee to begin receiving any retirement or pension benefit whatsoever under any such local retirement or pension system.

(d) No leave time accrued by an employee of a county probation system shall be transferred when the employee becomes a state employee. Any leave time accrued by an employee of such county probation system shall be satisfied as a debt owed to the employee by the county. (Code 1981, § 42-8-43.3, enacted by Ga. L. 1988, p. 1951, § 1.)

Editor's notes. — Ga. L. 1988, p. 1951, § 2, not codified by the General Assembly, provides that this Code section becomes effective "only upon the appropriation of

the funds necessary to carry out the provisions of this Act by the General Assembly." Funds were appropriated in 1992, effective July 1, 1992.

42-8-44. Construction of article.

This article shall be liberally construed so that its purposes may be achieved. (Ga. L. 1956, p. 27, § 20.)

ARTICLE 3

PROBATION OF FIRST OFFENDERS

JUDICIAL DECISIONS

Applicability. — O.C.G.A. Art. 3, Ch. 8, T. 42 does not apply to the sentence for violent felonies outlined in O.C.G.A. § 17-10-6.1. *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), overruling *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

Defendant found guilty of a serious violent felony under O.C.G.A. § 17-10-6.1 could apply for first offender status prior to the 1998 amendments to O.C.G.A. Art. 3, Ch. 8, T. 42. *Fleming v. State*, 271 Ga. 587, 523 S.E.2d 315 (1999), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998). *Horton v. State*, 241 Ga. App. 605, 527 S.E.2d 254 (1999).

Terms and conditions. — Probation cannot be revoked for a violation of terms and conditions if there are no terms and conditions to the probation. *Helton v. State*, 166 Ga. App. 565, 305 S.E.2d 27 (1983).

Carryover to subsequent probation. — When a first offender probation is

revoked, that probation, and the probation's terms and conditions, is effectively eliminated, leaving nothing to be carried over to any subsequent probation. *Helton v. State*, 166 Ga. App. 565, 305 S.E.2d 27 (1983).

Sentence admissible in murder trial. — At the sentencing phase of a murder trial, the state offered in aggravation an indictment, the defendant's plea of guilty to the indictment, and a sentence imposed under O.C.G.A. Art. 3, Ch. 8, T. 42 for the offenses of entering an automobile and theft by taking. This evidence was admissible, since evidence in aggravation is not limited to convictions, and reliable information tending to show a defendant's general bad character is admissible in aggravation. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Cited in *Puckett v. State*, 163 Ga. App. 156, 293 S.E.2d 544 (1982); *J.C. Penney Co. v. Miller*, 182 Ga. App. 64, 354 S.E.2d 682 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Applicability to misdemeanors. — First Offender Act, O.C.G.A. § 42-8-60 et seq., is applicable to misdemeanor offenses. 2000 Op. Att'y Gen. No. 2000-1.

Competency to serve on jury. — Person who has been placed on probation pursuant to the First Offender Act, O.C.G.A. § 42-8-60 et seq., does not become incompetent to serve on a grand or petit jury under Code Section 15-12-60 either before or after being discharged

without court adjudication of guilt. 1990 Op. Att'y Gen. No. U90-6.

"Conviction", as defined in the Drug-Free Public Work Force Act of 1990, O.C.G.A. § 45-23-3, does not include treatment under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq., nor does it include a conviction based on a plea of nolo contendere. 1990 Op. Att'y Gen. No. 90-16.

42-8-60. Probation prior to adjudication of guilt; violation of probation; review of criminal record by judge.

(a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not

been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:

(1) Defer further proceeding and place the defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.

(b) Upon violation by the defendant of the terms of probation, upon a conviction for another crime during the period of probation, or upon the court determining that the defendant is or was not eligible for sentencing under this article, the court may enter an adjudication of guilt and proceed as otherwise provided by law. No person may avail himself or herself of this article on more than one occasion.

(c) The court shall not sentence a defendant under the provisions of this article and, if sentenced under the provisions of this article, shall not discharge the defendant upon completion of the sentence unless the court has reviewed the defendant's criminal record as such is on file with the Georgia Crime Information Center.

(d) The court shall not sentence a defendant under the provisions of this article who has been found guilty of or entered a plea of guilty or a plea of nolo contendere for:

(1) A serious violent felony as such term is defined in Code Section 17-10-6.1;

(2) A sexual offense as such term is defined in Code Section 17-10-6.2;

(3) Sexual exploitation of a minor as defined in Code Section 16-12-100;

(4) Electronically furnishing obscene material to a minor as defined in Code Section 16-12-100.1;

(5) Computer pornography and child exploitation, as defined in Code Section 16-12-100.2; or

(6)(A) Any of the following offenses when such offense is committed against a law enforcement officer while such officer is engaged in the performance of his or her official duties:

(i) Aggravated assault in violation of Code Section 16-5-21;

(ii) Aggravated battery in violation of Code Section 16-5-24; or

(iii) Obstruction of a law enforcement officer in violation of subsection (b) of Code Section 16-10-24, if such violation results in serious physical harm or injury to such officer.

(B) As used in this paragraph, the term “law enforcement officer” means:

- (i) A “peace officer” as such term is defined in paragraph (8) of Code Section 35-8-2;
- (ii) A law enforcement officer of the United States government;
- (iii) A person employed as a campus police officer or school security officer;
- (iv) A conservation ranger; and
- (v) A jail officer employed at a county or municipal jail. (Ga. L. 1968, p. 324, § 1; Ga. L. 1982, p. 1807, § 1; Ga. L. 1985, p. 380, § 1; Ga. L. 1986, p. 218, § 1; Ga. L. 2006, p. 379, § 26/HB 1059; Ga. L. 2012, p. 172, § 1/SB 231.)

The 2012 amendment, effective July 1, 2012, deleted “or” at the end of paragraph (d)(4); substituted “; or” for a period at the end of paragraph (d)(5); and added paragraph (d)(6).

Cross references. — Probation for first offenders of laws relating to possession of narcotic drugs, marijuana, or other substances, § 16-13-2. Punishment of misdemeanor first offenders, § 17-10-3.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, “plea of guilty or” was substituted for “plea of guilty of” in the introductory language of subsection (d).

Editor’s notes. — Ga. L. 2006, p. 379, § 30/HB 1059, not codified by the General Assembly, provides that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.” This Act became effective July 1, 2006.

Law reviews. — For article on recidivism and convictions based on nolo contendere pleas, see 13 Ga. L. Rev. 723 (1979). For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979). For annual survey of criminal law and procedure, see 41 Mercer L. Rev. 115 (1989). For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For article, “No Second Chances: Immigration Consequences of Criminal Charges,” see 13 Ga. St. B.J. 26 (2007).

For note, “Padilla v. Kentucky: The Criminal Defense Attorney’s Obligation to Warn of Immigration Consequences of Criminal Conviction,” see 29 Ga. St. U.L. Rev. 891 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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APPLICATION TO SPECIFIC OFFENSES

SENTENCING UPON REVOCATION

APPEALS

General Consideration

General Assembly intended first offender probation sentence to be preliminary only, and, if completed without violation, permits the offender complete rehabilitation without the stigma of a felony conviction. *Stephens v. State*, 152 Ga. App. 591, 263 S.E.2d 477 (1979), rev'd on other grounds, 245 Ga. 835, 268 S.E.2d 330 (1980).

Applicability of 1982 amendment. — The 1982 amendment of O.C.G.A. § 42-8-60 is applicable only as to those defendants who committed their crime on or after November 1, 1982. *Hahn v. State*, 166 Ga. App. 71, 303 S.E.2d 299 (1983).

Sentencing of a defendant first offender to a term of confinement under the provisions of O.C.G.A. § 42-8-60, as amended effective November 1, 1982, for a crime committed on September 22, 1982, violated the ex post facto prohibition of the United States Constitution, when the law at the time of the commission of the crime contained no provision for a term of confinement. *Taylor v. State*, 181 Ga. App. 199, 351 S.E.2d 723 (1986).

First-offender treatment by consent, prior to 1982 amendment. — Although O.C.G.A. § 42-8-60 did not specifically provide for confinement as a condition of first-offender treatment before the 1982 amendment, when a condition of confinement was consented to by the defendant at the time the defendant's first-offender treatment was imposed and when no adjudication of guilt was entered at that time, the defendant's treatment was first-offender treatment even though ordered before the amendment, and the trial court did not err in revoking the first-offender treatment, entering an adjudication of guilt, and imposing a sentence which was harsher than the terms originally imposed. *O'Ree v. State*, 172 Ga. App. 51, 322 S.E.2d 89 (1984).

Prior conviction under First Offender Act counts in calculation of criminal history. — Because the defendant, who was discharged without adjudication of guilt under the Georgia First Offender Act (GFOA), O.C.G.A. § 42-8-60 et seq., after successfully completing probation, was not entitled to expungement of records, defendant's prior drug conviction

under the GFOA was not expunged and the district court properly included that conviction in the calculation of the defendant's criminal history category pursuant to U.S. Sentencing Guidelines Manual § 4A1.2 and properly sentenced the defendant to 21 months in prison for violating 21 U.S.C. § 841(a)(1), (b)(1)(C). *United States v. Knight*, 2005 U.S. App. LEXIS 24785 (11th Cir. Nov. 15, 2005) (Unpublished).

Construction with O.C.G.A. § 17-10-1. — Trial court did not err by sentencing the defendant to both confinement and probation in violation of the First Offender Act, O.C.G.A. § 42-8-60(a), as the statute did not mandate a sentence of either confinement or probation, and the defendant's probation was not conditioned upon the defendant spending some specified time incarcerated; O.C.G.A. § 17-10-1(a)(1) granted to the sentencing judge the power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper. *Johanson v. State*, 260 Ga. App. 181, 581 S.E.2d 564 (2003).

After the defendant was found guilty of arson and sentenced, the sentence could not be modified, pursuant to O.C.G.A. § 17-10-1(f) to grant the defendant first offender treatment because the plain language of the first offender statute, O.C.G.A. § 42-8-60 et seq., specifically prohibited such a modification after sentencing. *Burchette v. State*, 274 Ga. App. 873, 619 S.E.2d 323 (2005).

Construction with other statutes. — State's claim that the defendant's sentence was not subject to review because the sentence followed a probation revocation was rejected as the defendant initially was sentenced as a First Offender; O.C.G.A. § 42-8-60 et seq., the sentence was revoked and a sentence of 12 or more years was imposed. *State v. Swartz*, 277 Ga. App. 241, 626 S.E.2d 210 (2006).

Trial court abused the court's discretion in not even considering the defendant's request for first-offender sentencing, based on the court's inflexible rule that the court did not consider first-offender sentencing when a defendant went to trial and the court's belief that the defendant

General Consideration (Cont'd)

should have testified; even though the trial court was not required to grant first-offender status, the court was required to at least consider defendant's request. *Wnek v. State*, 262 Ga. App. 733, 586 S.E.2d 428 (2003).

Registration as special condition of probation. — Trial court did not err in imposing a special requirement on defendant's probation of registration as a sex offender, even though the defendant was sentenced under the First Offender Act, O.C.G.A. § 42-8-60 et seq., as the imposition of that special condition was authorized under the language in O.C.G.A. § 42-8-62(a) and to rule otherwise would render meaningless the language in § 42-8-62(a) concerning registration requirements. *Evors v. State*, 275 Ga. App. 345, 620 S.E.2d 596 (2005).

First offender treatment not barred prior to the 1998 amendments. — Prior to the 1998 amendments to O.C.G.A. § 17-10-6.1 and the First Offender Act, O.C.G.A. § 42-8-60 et seq., a defendant found guilty of a serious violent felony under § 17-10-6.1 was not barred from requesting and obtaining first offender treatment. *Burns v. State*, 241 Ga. App. 886, 528 S.E.2d 547 (2000).

Confinement not "incarceration." Sentence of defendant based on first offender treatment, to five years' probation, conditioned upon successive periods of confinement in a detention center, a diversion center, and in defendant's house under intensive supervision, was authorized and as such does not constitute incarceration, which refers to continuous and uninterrupted custody in a jail or penitentiary. *Penaherrera v. State*, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

First offender treatment is "conviction" under Immigration and Nationality Act. — Board of Immigration Appeals (BIA) did not abuse the Board's discretion when the Board denied the alien's motion to reopen because: (1) the alien pled guilty to two counts of child molestation and received five years probation on each count, thereby satisfying the requirements of 8 U.S.C. § 1101(a)(48)(A), and the mere fact that

the alien was sentenced pursuant to Georgia's First Offender Act, O.C.G.A. § 42-8-60(a) did not mean that the alien lacked a "conviction" for purposes of 8 U.S.C. § 1227; (2) nothing in the alien's extraordinary motion for a new trial, the state's nolle prosequere motion, or the superior court's orders indicated that the alien's guilty plea was taken in violation of Georgia law or the federal constitution; (3) although it was uncontroverted that a full and unconditional pardon would have defeated the charge that the alien was removable under 8 U.S.C. § 1227(a)(2)(A)(iii), the BIA did not abuse the Board's discretion when the Board refused to consider the alien's uncertified copy of the alien's pardon; and (4) even if the BIA had considered the alien's pardon, the pardon would not have eliminated the additional grounds for removal that the alien conceded to at the removal hearing. *Mohammed Salim Ali v. United States AG*, 443 F.3d 804 (11th Cir. 2006).

Guilty plea not a "conviction." — Entry of a guilty plea under O.C.G.A. § 42-8-60 is not a "conviction" within the usual definition of that term. *Priest v. State*, 261 Ga. 651, 409 S.E.2d 657 (1991).

First offender treatment is not "conviction" for purposes of serving on a jury. — Prospective petit juror serving a sentence under the First Offender Act, O.C.G.A. § 42-8-60 et seq., had not been "convicted" within the meaning of O.C.G.A. § 15-12-163(b)(5), which allowed either the state or the accused to object to the seating of a juror who had been convicted of a felony; the trial court therefore erred in disqualifying the juror for cause. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316, cert. denied, 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

Cited in *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Davenport v. State*, 136 Ga. App. 913, 222 S.E.2d 644 (1975); *Dailey v. State*, 136 Ga. App. 866, 222 S.E.2d 682 (1975); *Hudson v. State*, 137 Ga. App. 439, 224 S.E.2d 48 (1976); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Crawford v. State*, 144 Ga. App. 622, 241 S.E.2d 492 (1978); *Heath v. State*, 148 Ga. App. 559, 252 S.E.2d 4 (1978); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979); *Hogan v. State*, 158 Ga. App. 495,

280 S.E.2d 891 (1981); *Bearden v. State*, 161 Ga. App. 640, 288 S.E.2d 662 (1982); *Austin v. State*, 162 Ga. App. 709, 293 S.E.2d 10 (1982); *Puckett v. State*, 163 Ga. App. 156, 293 S.E.2d 544 (1982); *Burney v. State*, 165 Ga. App. 268, 299 S.E.2d 756 (1983); *Gilstrap v. State*, 250 Ga. 814, 301 S.E.2d 277 (1983); *Sultenfuss v. State*, 169 Ga. App. 618, 314 S.E.2d 459 (1984); *Kirby v. State*, 170 Ga. App. 11, 316 S.E.2d 23 (1984); *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985); *Goforth v. Wigley*, 178 Ga. App. 558, 343 S.E.2d 788 (1986); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Moreland v. State*, 183 Ga. App. 113, 358 S.E.2d 276 (1987); *Littlejohn v. State*, 191 Ga. App. 852, 383 S.E.2d 332 (1989); *Mobley v. State*, 192 Ga. App. 719, 386 S.E.2d 384 (1989); *Mays v. State*, 200 Ga. App. 457, 408 S.E.2d 714 (1991); *State v. Mohamed*, 203 Ga. App. 21, 416 S.E.2d 358 (1992); *Cameron v. State*, 246 Ga. App. 80, 539 S.E.2d 577 (2000); *Threlkeld v. State*, 250 Ga. App. 44, 550 S.E.2d 454 (2001); *Smith v. State*, 282 Ga. App. 317, 638 S.E.2d 440 (2006); *Ciccio v. City of Hephzibah*, 289 Ga. App. 134, 656 S.E.2d 245 (2008); *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008); *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

Procedure

Provisions not applicable to DUI cases. — Phrase “relating to probation of first offenders” in O.C.G.A. § 40-6-391(f) refers to the general title of O.C.G.A. Art. 3, Ch. 8, T. 42, and does not purport to limit the prohibition of first offender treatment only to convictions for driving under the influence when probation is imposed. *Sims v. State*, 214 Ga. App. 443, 448 S.E.2d 77 (1994).

O.C.G.A. § 40-6-391(f) did not violate equal protection under the Fourteenth Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. II by excluding DUI offenses from First Offender Act, O.C.G.A. § 42-8-60 et seq., coverage. The defendant did not show the absence of a rational relationship between the state’s compelling interest in protecting the public’s safety and the classification; the defendant’s equal protection argument boiled down to no more than the claim that the

legislature made a bad policy judgment about which offenders should be eligible for First Offender Act treatment. *Rhodes v. State*, 283 Ga. 361, 659 S.E.2d 370 (2008).

Jurisdiction of motion to withdraw guilty plea. — Since judgments of conviction are not entered in cases proceeding under the First Offender Act, O.C.G.A. § 42-8-60 et seq., unless the defendant violates the terms of probation, the sentencing court retains jurisdiction both for resentencing and to consider a motion to withdraw a guilty plea after the end of the term of court in which the plea was entered. *Tripp v. State*, 223 Ga. App. 73, 476 S.E.2d 844 (1996).

First-offender petition. — Defendant’s first-offender petition filed after the verdict was returned but before the court entered the sentence was timely. *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998).

First-offender status is discretionary. — Trial court in rendering sentence is not required to give first-offender status merely because it is requested, even if no previous offense is shown; but according to the circumstances of the case, including the conduct of the individual defendant in the crime, the trial court may give in the court’s discretion any sentence prescribed by law for the offense. *Welborn v. State*, 166 Ga. App. 214, 303 S.E.2d 755 (1983).

Trial court is not required to render a first offender status merely because it is requested even when no previous offense is shown; the trial court may give in the court’s discretion any sentence prescribed by law for an offense, or probation. *Todd v. State*, 172 Ga. App. 231, 323 S.E.2d 6 (1984); *Head v. State*, 203 Ga. App. 730, 417 S.E.2d 398 (1992).

Trial court did not abuse the court’s discretion by refusing to grant defendant first offender treatment because the defendant committed a misdemeanor after the offense for which he sought first offender treatment. *Stinnett v. State*, 215 Ga. App. 224, 447 S.E.2d 165 (1994).

Following technical violations of the conditions of probation, short of conviction for another crime or a determination of initial ineligibility, the trial court had discretion to continue a first offender on

Procedure (Cont'd)

probation without first revoking first offender status, entering an adjudication of guilt, and resentencing for the underlying offense. *Mohammed v. State*, 226 Ga. App. 387, 486 S.E.2d 652 (1997).

Nothing in Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq., required the trial court sua sponte to consider defendant's status as a first offender, and the trial court did not err by adopting a sentence that was consistent with the sentence the prosecutor agreed to recommend if the defendant pled guilty to robbery by intimidation. *Gibson v. State*, 257 Ga. App. 134, 570 S.E.2d 437 (2002).

Trial court did not fail to exercise the court's discretion in considering and then denying the defendant's request for first offender treatment with regard to the defendant's conviction upon a non-negotiated guilty plea for aggravated assault and possession of a firearm during the commission of a crime because the record showed that the trial judge considered the request and determined that, given the nature of the offense, it would be inappropriate to grant such status. *Steele v. State*, 270 Ga. App. 488, 606 S.E.2d 664 (2004).

Court has discretion. — Trial court did not abuse the court's discretion by denying the defendant's request for first offender treatment, pursuant to O.C.G.A. § 42-8-60, because the trial court's remarks during sentencing did not indicate a lack of awareness that the court had the discretion, was not applying a mechanical policy that prevented proper consideration of the request, or that there was an outright refusal to consider the request. *McCullough v. State*, 317 Ga. App. 853, 733 S.E.2d 36 (2012).

Trial court properly declined to grant appellant first offender treatment under O.C.G.A. § 42-8-60 on all the crimes in the four separate charging instruments to which the offender pled guilty because when the first judgment was entered, the offender had benefitted from first offender treatment on a verdict or plea and could not do so again. *Higdon v. State*, 291 Ga. 821, 733 S.E.2d 750 (2012).

First offender status does not mandate probationary period. — Under

O.C.G.A. § 42-8-60(a), a trial court may place a first offender defendant on probation or sentence the defendant to a term of confinement as provided by law and nothing in the statute mandates a probationary period for first offenders; on the contrary, a trial court exercises the court's discretion in determining whether to grant probation to a first offender. Therefore, the defendant, who was sentenced as recommended by the plea agreement, properly had the defendant's motion to correct sentence denied. *Wilson v. State*, 259 Ga. App. 627, 578 S.E.2d 260 (2003).

Consideration of first offender status mandatory. — Trial court's use of a mechanical sentencing formula or policy whereby first offender status consideration was automatically refused violated O.C.G.A. § 42-8-60. *Jones v. State*, 208 Ga. App. 472, 431 S.E.2d 136 (1993).

Trial court violated O.C.G.A. § 42-8-60(a) by failing to exercise the court's discretion and refusing to consider sentencing defendant as a first offender because the defendant opted for a jury trial; the use of a mechanical sentencing formula was an abdication of judicial responsibility. *Cook v. State*, 256 Ga. App. 353, 568 S.E.2d 482 (2002).

Defendant's sentence for numerous threat, obstruction, and fleeing convictions could not stand since the trial court abdicated the court's judicial responsibility by adopting an inflexible rule in not hearing the defendant's oral motion for first offender treatment. *Ramage v. State*, 259 Ga. App. 616, 578 S.E.2d 245 (2003).

Mere reminder insufficient to request sentencing under first offender act. — Merely reminding the sentencing judge that the conviction is the defendant's first offense is not equivalent to a request for sentencing under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq. *Powell v. State*, 271 Ga. App. 550, 610 S.E.2d 178 (2005).

Attorney must request first offender treatment. — Defendant's 10-year sentence for forgery was affirmed as the defendant attorney twice reminded the sentencing court of defendant's first offender status, but did not request that the defendant be sentenced under the Georgia First Offender Act, O.C.G.A.

§ 42-8-60; absent clear, i.e., unambiguous, statements in the record showing: (1) an explicit request for First Offender Act treatment at the time of sentencing; and (2) a failure to exercise discretion as evidenced by a misunderstanding of the law or a general policy against First Offender Act treatment, a defendant's sentence must be upheld. *Powell v. State*, 271 Ga. App. 550, 610 S.E.2d 178 (2005).

Trial court was authorized to consider the defendant's indifference to both the terms of the bond requirements imposed and the underlying charges filed in the court's decision regarding whether or not to treat the defendant as a first offender; hence, the court did not err in declining to impose sentence under the first offender statute. *Collins v. State*, 281 Ga. App. 240, 636 S.E.2d 32 (2006).

First offender treatment may not be granted after defendant has been sentenced. *Lewis v. State*, 217 Ga. App. 758, 458 S.E.2d 861 (1995).

After the defendant was found guilty of arson and sentenced for that offense, the plain language of O.C.G.A. § 42-8-60(a) barred a trial court from considering the defendant's motion to be granted first offender treatment. *Burchette v. State*, 274 Ga. App. 873, 619 S.E.2d 323 (2005).

After a defendant was convicted for statutory rape, the trial court lacked jurisdiction to resentence the defendant as a first offender or to rescind the conviction or confinement portion of the sentence. First offender treatment was only permitted before a defendant had been adjudicated guilty and sentenced. *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

Out of state conviction. — Trial court did not err by denying defendant first-offender treatment as defendant presented no evidence, in the form of a certified copy of the conviction in another state in which defendant was sentenced to a one-year term of probation, that the prior conviction in the other state was a misdemeanor. *Middleton v. State*, 264 Ga. App. 615, 591 S.E.2d 493 (2003).

First offender status application to misdemeanors. — In a felony case where defendant's first offender status was removed from the sentence defendant received for pleading guilty to theft by re-

ceiving a stolen motor vehicle because defendant had previously pled guilty to a misdemeanor, the appellate court held that the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq., applied to misdemeanors. *Stafford v. State*, 251 Ga. App. 203, 554 S.E.2d 219 (2001).

Prior prosecution in which defendant given first offender treatment. — As a result of the changes made in 1985 to O.C.G.A. § 42-8-60, the use of a prior prosecution in which the defendant was given first offender treatment and successfully completed the terms of the defendant's probated sentence "is not allowable by law" as provided in O.C.G.A. § 42-8-65. Accordingly, the portion of the case in which the defendant was sentenced under subsection (a) of O.C.G.A. § 17-10-7 as a repeat offender had to be reversed and remanded for resentencing. *Queen v. State*, 182 Ga. App. 794, 357 S.E.2d 150 (1987) (holding Op. Att'y Gen. U81-32 incorrectly states present law).

Expungement upon completion of probation of the records of first offender treatment of criminal defendants runs contrary to the intent and the practical operation of the First Offender Act, O.C.G.A. § 42-8-60 et seq. *State v. C.S.B.*, 250 Ga. 261, 297 S.E.2d 260 (1982).

Impeachment of witness in civil trial with first offender status. — Notwithstanding the fact that a conviction does not result unless the person sentenced fails to complete satisfactorily the probationary period, the record of a first offender sentence may be used to impeach a witness in a civil action. *Hightower v. GMC*, 175 Ga. App. 112, 332 S.E.2d 336 (1985), overruled on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990), aff'd, 255 Ga. 349, 338 S.E.2d 426 (1986).

Consideration for plea agreement. — Granting first offender treatment to the defendant for crimes for which the defendant could have been barred from seeking office for ten years constituted consideration for a plea agreement. *State v. Barrett*, 215 Ga. App. 401, 451 S.E.2d 82 (1994), rev'd on other grounds, 265 Ga. 489, 458 S.E.2d 620 (1995).

Opportunity for rehabilitation. — If an offender does not take advantage of an

Procedure (Cont'd)

opportunity for rehabilitation, the offender's trial which has been suspended is continued and an adjudication of guilt is made and a sentence entered. *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

If, by violating the terms of the defendant's probation, the defendant shows that the defendant is not worthy of the offered opportunity for rehabilitation then, and only then is the defendant sentenced to the penitentiary. No former adjudication of guilt having been made and no prior sentence having been entered thereon, the defendant is subject to receive any sentence permitted by law for the offense the defendant has been found guilty of committing. *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

Type of evidence necessary to support revocation. — Certified copy of a criminal conviction constitutes sufficient evidence of a violation of the stated term of probation. *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983).

Better practice would be to introduce evidence of the criminal offense underlying the conviction as well as a certified copy of the conviction itself. If that is done, the fact that the conviction is reversed on appeal because of error, or because the evidence does not support a finding of guilt beyond a reasonable doubt, will not vitiate a revocation of probation properly based on slight evidence of the criminal offense. *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983).

Only slight evidence of the occurrence of probation violation will support a revocation. *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983); *Anderson v. State*, 177 Ga. App. 130, 338 S.E.2d 716 (1985).

As in probation revocation proceedings, only slight evidence is necessary to support a termination of probation under the first offender statute. *Evans v. State*, 185 Ga. App. 805, 366 S.E.2d 165 (1988).

Because the evidence showed that the probationer had continuous access to the firearms in the house on the day of a fatal shooting, and that the probationer intended to, and did in fact exercise control over the sons' access to one of the guns in the minutes leading up to the shooting,

the trial court properly found that the probationer had constructive possession of the firearm. *Wright v. State*, 279 Ga. App. 299, 630 S.E.2d 774 (2006).

Witness's first offender sentencing records were inadmissible in defendant's trial. — After the defendant cross-examined a witness for the state regarding the witness's first offender sentence under the First Offender Act, O.C.G.A. § 42-8-60 et seq., in an effort to show witness bias, the trial court erred in requiring the defendant to introduce into evidence certified copies of the relevant sentencing record and in thus denying the defendant the right to open and conclude closing arguments by forcing the defendant to present evidence as the defendant had a right under the Confrontation Clause of U.S. Const., amend. VI to cross-examine the witness regarding the witness's first offender probation status to show bias, but the records relevant to that status were not admissible because there was no adjudication of the witness's guilt; the error, however, was harmless in light of the overwhelming evidence of the defendant's guilt. *Smith v. State*, 276 Ga. 263, 577 S.E.2d 548 (2003).

Trial court did not abuse the court's discretion in prohibiting the defendant's cross-examination of a witness regarding the witness's first offender plea in order to show bias and a motive to testimony favorable to the state because there was no evidence showing the connection between the witness's first offender status and the witness's desire to shade the witness's testimony to curry favor with the state; the defendant had to present facts in addition to the existence of two first offender pleas to support the defendant's efforts to impeach the witness for bias. *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

Use in three-felony recidivist sentencing. — Remand was necessary because it was unclear whether one of the defendant's convictions, which was a first offender conviction pursuant to O.C.G.A. § 42-8-60 et seq., was successfully completed, in which case there was no "conviction" as that term was defined under O.C.G.A. § 16-1-3(4) because there was no adjudication of guilt, or alternatively,

whether the first offender sentence was violated and the trial court thereafter entered an adjudication of guilt and a sentence thereon, in which case it could be counted as one of the three felonies for purposes of recidivist sentencing under O.C.G.A. § 17-10-7(c). *Swan v. State*, 276 Ga. App. 827, 625 S.E.2d 97 (2005).

Withdrawal of guilty plea. — Trial court did not err in instructing the defendant that the defendant would not be allowed to withdraw the Alford plea between the time the plea was entered and the pronouncement of the sentence; this instruction did not violate O.C.G.A. § 17-7-93(b) as that statute did not apply to pleas resulting in treatment as a first offender under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq. *Winkles v. State*, 275 Ga. App. 351, 620 S.E.2d 594 (2005).

Application to Specific Offenses

Construed with rape conviction. — Trial court did not err in denying the defendant's request to charge the jury on misdemeanor statutory rape and in imposing a felony sentence as: (1) a charge of misdemeanor statutory rape was not supported by the evidence due to the difference in the defendant's and the victim's age at the time of the offense; (2) the defendant's requested charge set forth an incorrect principle of law within the context of the case; and (3) the sentence of five years probation under the First Offender Act, O.C.G.A. § 42-8-60 et seq., fell within the statutory range. *Orr v. State*, 283 Ga. App. 372, 641 S.E.2d 613 (2007).

Based on the plain language of O.C.G.A. §§ 17-10-6.2(a)(4) and 42-8-60(d)(2), a defendant who commits statutory rape is excluded from first offender consideration if the defendant was 21 years of age or older. Thus, a defendant who was 18 at the time of the offense and 19 at the time of the conviction was eligible for first offender consideration. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

Construed with O.C.G.A. § 40-5-75 provisions on controlled substances. — Section 40-5-75, which mandates driver's license suspension for any person convicted of possession of a controlled substance or marijuana, does not apply to

those defendants who are given first offender treatment under O.C.G.A. § 42-8-60. *Priest v. State*, 261 Ga. 651, 409 S.E.2d 657 (1991).

Defendant who is given first offender treatment has not been "convicted" within the meaning of O.C.G.A. § 40-5-75 and mandatory driver's license suspension is not required. *Priest v. State*, 261 Ga. 651, 409 S.E.2d 657 (1991).

Construed with O.C.G.A. § 17-10-6.1. — Applying the Georgia Supreme Court's holding from *Fleming v. State*, 271 Ga. 587, 523 S.E.2d 315 (1999), resentencing was required because, prior to the 1998 amendments to O.C.G.A. §§ 17-10-6.1 and 42-8-60 et seq., a defendant found guilty of a serious violent felony under § 17-10-6.1 was not precluded from requesting and obtaining first offender treatment. *Burleson v. State*, 242 Ga. App. 217, 529 S.E.2d 228 (2000).

Failure to pay fine. — Sentencing court could not revoke probation for failure to pay fine and restitution, absent evidence and findings that defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

First offender consideration not appropriate in child molestation case. — Because the defendant was not entitled to first offender treatment for the crimes of child molestation and enticing a child for indecent purposes, to which the defendant pled guilty, the defendant's claims that trial counsel was deficient for misinforming the defendant about the defendant's eligibility for and failing to request first offender treatment were without merit. *Harris v. State*, 325 Ga. App. 568, 754 S.E.2d 148 (2014).

Sentencing Upon Revocation

Adjudication of guilt upon violation of probation or conviction for other crime. — When no adjudication of guilt had been made and no prior sentence had been entered, it is clear that if an individual on probation under the First Offender Act violates the terms of the individual's probation or is convicted for another crime, the trial court may enter

Sentencing Upon Revocation (Cont'd)

an adjudication of guilt and impose any sentence permitted by law for the offense the individual has been found guilty of committing. *Beasley v. State*, 165 Ga. App. 160, 299 S.E.2d 886 (1983).

By committing a new crime, defendant lost the benefit of first offender status, and the unadjudicated guilt in connection with the prior state offense was properly considered a prior conviction for purposes of sentencing under the U.S. Sentencing Guidelines Manual, which pursuant to U.S. Sentencing Guidelines Manual § 4A1.2, mandated the imposition of criminal history points, even if doing so undermined the purpose of the Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq. *United States v. Barner*, 572 F.3d 1239 (11th Cir. 2009).

Trial court did not err in increasing the sentence originally imposed upon the defendant because the defendant was informed when the first offender probation sentence was pronounced that, upon an adjudication of guilt, the defendant could be sentenced to the maximum allowable under the law; although the sentencing form was ambiguous since both the first offender treatment box and the felony sentence box were checked the ambiguity in the form was not fatal to the trial court's imposition of a sentence greater than the original one. *Otuwa v. State*, 303 Ga. App. 410, 693 S.E.2d 610 (2010).

Sentence after expiration of first offender probation period. — Trial court had jurisdiction to impose sentence on drug possession charges based upon the defendant's violation of probation imposed for those offenses even though the defendant's three-year period of first offender probation had already expired, after the state had filed a petition for imposition of sentence prior to expiration of the probation period. *State v. Boyd*, 189 Ga. App. 617, 377 S.E.2d 11 (1988), cert. denied, 490 U.S. 1111, 109 S. Ct. 3168, 104 L. Ed. 2d 1030 (1989).

Trial court had the authority to revoke the defendant's first offender status and enter an adjudication of guilt for the defendant's violations of probation, pursuant to O.C.G.A. §§ 42-8-34(g) and

42-8-60(b), because the defendant was still serving the defendant's probated sentence. Further, because the trial court, when pronouncing the defendant's first offender sentence, advised the defendant that, upon adjudication of guilt, the defendant could be resentenced to the statutory maximum for two counts of child molestation, and that the time served would be credited against the defendant's new sentence, the trial court was authorized to increase the sentence originally imposed. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

Length of sentence. — When a person on probation as a first offender violates the terms of the offender's probation and adjudication of guilt is entered pursuant to O.C.G.A. § 42-8-60, the offender is subject to receive any sentence permitted by law, including a sentence greater than the period to be served on probation which was originally imposed under the first offender law. *Austin v. State*, 162 Ga. App. 709, 293 S.E.2d 10 (1982).

Since the defendant was informed at the time the defendant was originally placed on probation that the defendant could receive full sentence upon violation of the defendant's probation, the court, in revoking the defendant's probation, did not lack authority to impose a 10-year sentence on the ground that the first-offender sentencing document entered by the court imposed only five years. *Griffin v. State*, 163 Ga. App. 871, 295 S.E.2d 863 (1982).

When the defendant's sentence under paragraph (a)(1) was five years' probation, with the requirement that 90 to 120 days be served in a probation boot camp, later modified to a probation detention center, when the defendant's probation was revoked, the trial court could have sentenced the defendant to the maximum penalty for the burglary conviction. *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

Time served on probation credited to sentence after probation revoked. — When a probationer is sentenced to serve time in a penal institution for the offense for which the probationer has spent time on probation, that probation time must be credited to any sentence

received, including cases involving first offender probation. *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980); *Perdue v. State*, 155 Ga. App. 802, 272 S.E.2d 766 (1980); *Lillard v. State*, 156 Ga. App. 54, 274 S.E.2d 96 (1980); *Howell v. State*, 159 Ga. App. 577, 284 S.E.2d 82 (1981); *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

When first offender probation under subsection (b) of O.C.G.A. § 42-8-60 is revoked, credit must be given for time served on probation. *Tallant v. State*, 187 Ga. App. 138, 369 S.E.2d 789 (1988).

After the defendant violated the terms of the defendant's probation, the court could not impose the maximum sentence without giving the defendant credit for time served on probation, since to do so would impose a sentence exceeding the maximum allowed by law. *Franklin v. State*, 236 Ga. App. 401, 512 S.E.2d 304 (1999).

In the case of defendant who was convicted and sentenced for child molestation, a resentencing order requiring defendant to serve a total of 13 years — five to be served in prison beyond the three already served on probation, to be followed by an additional five years on probation — was not error because defendant was re-sentenced within the maximum sentence allowable by law, defendant was clearly advised of this possibility, and the court credited the time already served on probation. *Roland v. Meadows*, 273 Ga. 857, 548 S.E.2d 289 (2001).

Increased sentence on revocation proper. — Trial court does not err in imposing a greater sentence on defendant than the original first offender sentence, in revoking defendant's earlier probation, when the first offender sentence of probation plainly stated, "If such probation is revoked or cancelled, the court may adjudge the defendant guilty of the above offense and impose any sentence permitted by law for the ... offense." *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983).

Trial court erred in imposing greater sentence than revoked term of four years' probation, and in refusing to give defendant credit for time served on probation. *Lillard v. State*, 156 Ga. App. 54, 274 S.E.2d 96 (1980).

Trial court violated original sentencing order by imposing new sentence greater than that originally imposed and erred in failing to give credit for time served on probation. *Saladine v. State*, 165 Ga. App. 836, 302 S.E.2d 739 (1983).

Revocation sentence not error. See *Beeks v. State*, 169 Ga. App. 499, 313 S.E.2d 760 (1984).

Sentence vacated and resentencing ordered when the trial court erred by increasing a juvenile defendant's voluntary manslaughter sentence after the defendant had already begun serving the sentence, because the original sentence was final at the time the sentence was imposed, and the defendant had no reason to believe otherwise; hence, the trial court's increased sentence constituted double jeopardy and could not stand. *Williams v. State*, 273 Ga. App. 42, 614 S.E.2d 146 (2005).

Double jeopardy concerns did not prohibit resentencing after original sentence had begun being served if the resentencing was allowed by law and the defendant had no reasonable expectation in the finality of the original sentence; resentencing after a defendant had begun serving the original sentence was allowed under the First Offender Act, O.C.G.A. § 42-8-60 et seq., because the defendant initially lied to the trial court about a prior conviction to receive first offender treatment, and since the defendant was warned by the trial court that the defendant was subject to resentencing if the defendant was untruthful about the defendant's record, the defendant had no reasonable expectation that the original sentence was final. *Wilford v. State*, 278 Ga. 718, 606 S.E.2d 252 (2004).

Defendant eligible to serve ordered term of confinement. — Trial court did not err in denying the defendant's motion to correct an illegal sentence because, in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-60 et seq., and O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and, consequently,

Sentencing Upon Revocation (Cont'd)

within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act when the legislature enacted the State-Wide Probation Act. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

Appeals

Appeal discretionary. — Because the drug court program under O.C.G.A. § 16-13-2(a) is similar to the first offender statute of O.C.G.A. § 42-8-60 and because § 42-8-60 appeals are discretionary under O.C.G.A. § 5-6-35(a)(5), the discretionary

appeal procedures of § 5-6-35(a)(5) must be followed when appealing after violation of the conditions of the drug court program. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

Appellate review. — Presumption exists that a trial court has regularly and correctly conducted the proceedings; thus, absent clear statements in the record showing an explicit request for first offender treatment at the time of sentencing and a failure to exercise discretion as evidenced by a misunderstanding of the law or a general policy against first offender treatment, the appellate court will affirm the sentence as pronounced by the trial court. *McCullough v. State*, 317 Ga. App. 853, 733 S.E.2d 36 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Legislative intent. — General Assembly's intent was to allow, within the court's discretion, the defendant to utilize first offender treatment for crime or crimes growing out of same conduct which may be the subject of multicount indictment. 1975 Op. Att'y Gen. No. U75-85.

General Assembly intended first offender probation to have a different result from ordinary periods of probation. 1978 Op. Att'y Gen. No. U78-21.

It was the intent of the General Assembly to give the trial judges authority to permit certain defendants, whom the judges believed to be worthy of an opportunity not to have a record of adjudication of guilt of a criminal offense, to undergo a period of probation, which if successfully completed would result in the defendants being discharged without there ever being an adjudication of guilt. 1978 Op. Att'y Gen. No. U78-21.

First offender probation is intended to have a different result from ordinary periods of probation. It was the intent of the General Assembly when it enacted this section to give the trial judges authority to permit those defendants whom the judges believed to be worthy of an opportunity not to have a record of adjudication of guilt for a criminal offense to serve a period of probation, which if successfully completed would result in the defendants being completely exonerated without

there ever being any adjudication of guilt. 1980 Op. Att'y Gen. No. 80-79.

Probation administered prior to adjudication of guilt. — Probation administered pursuant to O.C.G.A. § 42-8-60 is administered prior to adjudication of guilt. 1981 Op. Att'y Gen. No. U81-12.

Plea of guilty does not fall under rule that such plea, when accepted and entered up, is tantamount to a conviction. 1971 Op. Att'y Gen. No. U71-87.

Payment of fine. — Superior court judge may impose payment of fine as term and condition of probation for a defendant being treated as a first offender. 1975 Op. Att'y Gen. No. U75-42.

Applicability of § 42-8-65. — Provision of O.C.G.A. § 42-8-65 regarding release of record of discharge applies to records in cases when finding of guilt was made, pursuant to conviction or plea, but when adjudication of guilt was withheld pending successful completion of probation. 1981 Op. Att'y Gen. No. U81-32.

Split sentences. — Sentencing court may impose a "split sentence" of a period of incarceration followed by a period of probation on defendants subject to O.C.G.A. § 42-8-60. 1985 Op. Att'y Gen. No. 85-40.

When sentence begins to run. — Sentence imposed subsequent to revocation of first offender probation should run

from date sentence is imposed. 1976 Op. Att'y Gen. No. 76-16.

Revocation by court in circuit when probation imposed. — Only the circuit imposing first offender probation may revoke that period of probation, even though supervision has been transferred to another judicial circuit. 1980 Op. Att'y Gen. No. 80-79.

Applicant for pistol permit. — Applicant for a license to carry a pistol or revolver under former Code 1933, § 26-2904 (see now O.C.G.A. § 16-11-129) who had successfully completed, or who had been released prior to termination of the probationary period, did not have to be free from all restraint or supervision for a specified period of years before applying for a pistol permit, since the successful completion of the period of probation resulted in there being no adjudication of guilt and, therefore, no conviction. 1978 Op. Att'y Gen. No. U78-21.

Firefighter's qualifications not affected. — Person serving probation under O.C.G.A. § 42-8-60 not convicted for purposes of Georgia Firefighter Standards and Training Act (O.C.G.A. T. 25, Ch. 4, Art. 1). 1981 Op. Att'y Gen. No. U81-12.

Fulfillment of terms of probation under O.C.G.A. § 42-8-60 or release by court

prior to termination of period of probation is not a criminal conviction for purposes of Georgia Firefighter Standards and Training Act (O.C.G.A. T. 25, Ch. 4, Art. 1). 1981 Op. Att'y Gen. No. U81-12.

Individual in process of serving period of probation under O.C.G.A. § 42-8-60 should be treated, for purposes of Georgia Firefighter Standards and Training Act (O.C.G.A. T. 25, Ch. 4, Art. 1), in same manner as individual who has satisfactorily fulfilled terms of or who has been released from such probation. 1981 Op. Att'y Gen. No. U81-12.

First offender treatment not "conviction" under Drug-free Workplace Act. — First offender treatment upon a verdict or plea of guilty is not a "conviction" within the meaning of the Drug-free Workplace Act (O.C.G.A. § 45-23-1 et seq.), applicable to public employees. 1992 Op. Att'y Gen. No. 92-10.

First offender treatment is "conviction" under Drug-free Campus Act. — First offender treatment upon a verdict or plea of guilty is a "conviction" within the meaning of the Drug-free Postsecondary Education Act of 1990 (O.C.G.A. § 20-1-20 et seq.), applicable to students in institutions of higher learning. 1992 Op. Att'y Gen. No. 92-10.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 567 et seq.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Plea of nolo contendere or non vult contendere, 89 ALR2d 540.

Propriety, in imposing sentence for orig-

inal offense after revocation of probation, of considering acts because of which probation was revoked, 65 ALR3d 1100.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

42-8-61. Defendant to be informed of terms of article at time sentence imposed.

The defendant shall be informed of the terms of this article at the time of imposition of sentence. (Ga. L. 1968, p. 324, § 3; Ga. L. 1982, p. 1807, § 2.)

JUDICIAL DECISIONS

Defendant informed of consequences if probation violated. — Trial

court did not err in increasing the sentence originally imposed upon the defen-

dant because the defendant was informed when the first offender probation sentence was pronounced that, upon an adjudication of guilt, the defendant could be sentenced to the maximum allowable under the law; although the sentencing form was ambiguous since both the first offender treatment box and the felony sentence box were checked, the ambiguity in the form was not fatal to the trial court's imposition

of a sentence greater than the original one. *Otuwa v. State*, 303 Ga. App. 410, 693 S.E.2d 610 (2010).

Cited in *Bethea County v. Dixon*, 72 Ga. App. 384, 33 S.E.2d 723 (1945); *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979).

42-8-62. Discharge of defendant without adjudication of guilt.

(a) Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. Except for the registration requirements under the state sexual offender registry and except as otherwise provided in Code Section 42-8-63.1, the discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. It shall be the duty of the clerk of court to enter on the criminal docket and all other records of the court pertaining thereto the following:

“Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties, except for registration requirements under the state sexual offender registry and except with regard to employment providing care for minor children or elderly persons as specified in Code Section 42-8-63.1; and the defendant shall not be considered to have a criminal conviction. O.C.G.A. 42-8-62.”

Such entry shall be written or stamped in red ink, dated, and signed by the person making such entry or, if the docket or record is maintained using computer print-outs, microfilm, or similar means, such entry shall be underscored, boldface, or made in a similar conspicuous manner and shall be dated and include the name of the person making such entry. The criminal file, docket books, criminal minutes and final record, and all other records of the court relating to the offense of a defendant who has been discharged without court adjudication of guilt pursuant to this subsection shall not be altered as a result of that discharge, except for the entry of discharge thereon required by this subsection, nor shall the contents thereof be expunged or destroyed as a result of that discharge.

(b) Should a person be placed under probation or in confinement under this article, a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the defendant a

record of discharge and exoneration, as provided in this Code section, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of probation or confinement shall have been previously forwarded to the Department of Corrections, to the Georgia Crime Information Center, and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of the defendant has not been forwarded as provided in this Code section, upon request of the defendant or his attorney or representative, the record of the same shall be forwarded by the clerk of court so as to reflect the discharge and exoneration. (Ga. L. 1968, p. 324, § 2; Ga. L. 1978, p. 1621, § 1; Ga. L. 1982, p. 1807, § 3; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 442, § 1; Ga. L. 1990, p. 735, § 1; Ga. L. 2001, p. 1004, § 2; Ga. L. 2003, p. 840, § 4.)

Law reviews. — For note on the 2001 amendment of this Code section, see 18 Ga. St. U.L. Rev. 227 (2001). For note on

the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 179 (2003).

JUDICIAL DECISIONS

Probation sentence merely preliminary. — Any probationary sentence entered under this section is preliminary only, and, if completed without violation, permits an offender complete rehabilitation without the stigma of a felony conviction. If, however, such offender does not take advantage of such opportunity for rehabilitation, the offender's trial which, in effect, has been suspended is continued and an adjudication of guilt is made and a sentence entered. *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

Restrictions may be imposed during service of first offender term. — Subsection (a) of O.C.G.A. § 42-8-62 allows a defendant's slate to be wiped clean for the purposes of recordation of a criminal conviction and its effect on civil rights or liberties after a defendant successfully fulfills the first offender terms. It does not prohibit restrictions on a defendant's civil rights or liberties imposed during service of the first offender term. *Salomon v. Earp*, 190 Ga. App. 405, 379 S.E.2d 217 (1989), overruled on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990).

Necessity of adjudication of guilt. — Despite the defendant's two violations of the conditions of probation, because no adjudication of guilt was entered during

the term of the defendant's first offender probationary sentence, upon fulfillment of the probationary period, the defendant was entitled to discharge without an adjudication of guilt under O.C.G.A. § 42-8-62(a). *Ailara v. State*, 311 Ga. App. 862, 717 S.E.2d 498 (2011).

First-offender prohibited from obtaining pistol permit. — Provision of O.C.G.A. § 16-11-129(b), prohibiting the granting of a pistol permit to a person convicted as a first-offender for possession of a controlled substance, applied prospectively to an applicant who had been discharged as a first-offender five years before enactment of the provision. *Foss v. Probate Court of Chatham County*, 232 Ga. App. 612, 502 S.E.2d 278 (1998).

"Discharge" automatic upon completion of term. — "Discharge" of a non-first-offender probationer is automatic upon the successful completion of the terms of the sentence and is not dependent upon the subsequent formalization of that successful completion. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

After the defendant was sentenced under O.C.G.A. Art. 3, Ch. 8, T. 42 to five years of probation on one count, followed by five consecutive 12 month sentences on other counts, the defendant was entitled to have the defendant's record cleared of

the first count under O.C.G.A. Art. 3, Ch. 8, T. 42 after completing the defendant's first five years of probation. *Arrington v. State*, 234 Ga. App. 187, 505 S.E.2d 851 (1998).

Defendant, pursuant to O.C.G.A. § 42-8-62(a), was not automatically discharged under the Georgia First Offender Act, O.C.G.A. § 42-8-60, when the defendant was released from confinement because the automatic discharge of the defendant occurred upon the successful completion of the terms of the defendant's sentence. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

Defendant's driver's license was properly suspended after the defendant pled guilty to, and received sentences as a first offender for, two counts of homicide by vehicle in the first degree and one count of driving with ability impaired by alcohol. *Salomon v. Earp*, 190 Ga. App. 405, 379 S.E.2d 217 (1989), overruled on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990).

Use of prior prosecution in which defendant given first-offender treatment. — As a result of the changes made in 1985 to O.C.G.A. § 42-8-62, the use of a prior prosecution in which the defendant was given first offender treatment and successfully completed the terms of the defendant's probated sentence "is not allowable by law" as provided in O.C.G.A. § 42-8-65. Accordingly, the portion of the case in which the defendant was sentenced under subsection (a) of O.C.G.A. § 17-10-7 as a repeat offender had to be reversed and remanded for resentencing. *Queen v. State*, 182 Ga. App. 794, 357 S.E.2d 150 (1987) (holding Op. Att'y Gen. U81-32 incorrectly states present law).

Because the defendant had completed a three-year first-offender probationary sentence and had been discharged without court adjudication of guilt pursuant to O.C.G.A. § 42-8-62 at the time the defendant allegedly violated O.C.G.A. § 16-11-131, the trial court properly dismissed the charge. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

Because the defendant, who was discharged without adjudication of guilt under the Georgia First Offender Act (GFOA) after successfully completing pro-

bation, was not entitled to expungement of records, defendant's prior drug conviction under the GFOA was not expunged and the district court properly included that conviction in the calculation of defendant's criminal history category pursuant to U.S. Sentencing Guidelines Manual § 4A1.2 and properly sentenced the defendant to 21 months in prison for violating 21 U.S.C. § 841(a)(1), (b)(1)(C). *United States v. Knight*, 2005 U.S. App. LEXIS 24785 (11th Cir. Nov. 15, 2005) (Unpublished).

Impeachment of witness through first-offender record. — In both civil and criminal cases, unless there is an adjudication of guilt, a witness may not be impeached on general credibility grounds by evidence of a first offender record. *Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997).

Under the First Offender Act, O.C.G.A. § 42-8-60 et seq., the trial court properly prohibited a defendant from impeaching a witness with a forgery offense. The defendant cited no authority in support of the argument that this violated the defendant's rights under the confrontation clause of the Sixth Amendment, and the court held that impeachment to show a general lack of trustworthiness based on a prior criminal conviction was not guaranteed by the confrontation clause. *Butler v. State*, 285 Ga. 518, 678 S.E.2d 92 (2009).

Admissibility in civil actions. — Evidence of a first offender's guilty plea is not admissible for the purpose of impeaching a witness by showing the witness to have been convicted of a crime involving moral turpitude, even though it is admissible in a civil trial to impeach an adverse witness by disproving or contradicting the witness's testimony. *Witcher v. Pender*, 260 Ga. 248, 392 S.E.2d 6 (1990).

"Rehabilitation" within meaning of federal rule. — Section did not provide for "rehabilitation" within the meaning of Rule 609(c), Fed. R. Evid., which prohibits evidence of a prior conviction for purposes of impeachment if the conviction has been the subject of a "rehabilitation." *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir.), rehearing denied, 764 F.2d 1411 (11th Cir. 1985).

Guilty plea under first-offender inadmissible. — Trial court erred in admit-

ting testimony and documents concerning defendant's entry of the first-offender guilty plea to commercial gambling since the defendant was still on probation at the time of the condemnation trial, and because it was not used for impeachment purposes, its use was prohibited. *Jones v. State*, 212 Ga. App. 682, 442 S.E.2d 880 (1994).

Defendant's guilty plea to an offense for which the defendant received first-offender treatment should not have been admitted as evidence that the defendant committed a similar independent offense. *Davis v. State*, 269 Ga. 276, 496 S.E.2d 699 (1998).

First offender record properly admitted. — Defendant's first offender record was properly considered at the defendant's sentencing hearing, and evidence regarding the defendant's underlying behavior in connection with the first offender plea was not required. *Williams v. State*, 228 Ga. App. 622, 492 S.E.2d 290 (1997).

Eligibility for jury duty. — Prospective juror who had fulfilled probation requirements was eligible under O.C.G.A. § 42-8-62(a) for jury duty in a criminal case. *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

Sex offender registration as special condition to probation. — Trial court did not err in imposing a special requirement on defendant's probation of registration as a sex offender, even though the defendant was sentenced under the First Offender Act, O.C.G.A. § 42-8-60 et seq., as the imposition of that special condition was authorized under the language in § 42-8-62(a) and to rule otherwise would render meaningless the language in O.C.G.A. § 42-8-62(a) concerning registration requirements. *Evors v. State*, 275 Ga. App. 345, 620 S.E.2d 596 (2005).

Sex offender registration not required after successful completion of first offender sentence. — Defendant was not required to register as a sexual offender because the defendant success-

fully completed a first-offender sentence for statutory rape and burglary charges, and a "conviction" under O.C.G.A. § 42-1-12(a)(8) did not include a discharge without an adjudication of guilt following the successful completion of a first offender sentence; the plain language of O.C.G.A. § 42-8-62(a) provided that, with certain exceptions, once a first offender was discharged without an adjudication of guilt, he or she stood completely exonerated and was not considered as having been convicted of a crime. *Jackson v. State*, 299 Ga. App. 356, 683 S.E.2d 60 (2009).

Failure to challenge evidence of non-adjudicated crime was ineffective assistance of counsel. — Defendant's convictions for armed robbery, aggravated assault, and kidnapping of a couple in a residence were reversed on appeal. Evidence that one victim was ordered from a standing to a lying position and that another was dragged around the home was insufficient to establish asportation to support the kidnapping counts. The defendant's convictions for armed robbery and aggravated assault were reversed as the defendant established ineffective assistance of counsel based on trial counsel's failure to object to the inadmissible hearsay statements of two witnesses and the admission of improper impeachment evidence against the defendant regarding a crime for which the defendant was never adjudicated guilty for as a result of being a first offender. *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

Cited in *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Romano v. State*, 193 Ga. App. 682, 388 S.E.2d 757 (1989); *Tilley v. State*, 197 Ga. App. 97, 397 S.E.2d 506 (1990); *Melton v. State*, 216 Ga. App. 215, 454 S.E.2d 545 (1995); *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Probation sentence not necessarily conviction. — Placing of an individual

on probation does not by itself result in a conviction and any person serving such a

probation has not suffered a conviction which would disfranchise the individual; the individual therefore would be eligible to vote. 1974 Op. Att'y Gen. No. 74-26.

Fulfillment of probation terms or early release not criminal conviction. — Fulfillment of the terms of probation or the release by the presiding court prior to termination of a period of probation is not a criminal conviction for purposes of Ga. L. 1973, p. 693, § 1 et seq. (see now O.C.G.A. Ch. 4, T. 25). 1976 Op. Att'y Gen. No. 76-130.

Placement or discharge of person from first offender probation is disposition to be accurately recorded, maintained, and reported by Georgia Crime Information Center. 1975 Op. Att'y Gen. No. 75-110.

Confidentiality of first offender records. — Confidentiality provisions of the First Offender Act having been repealed at the 1990 session of the General Assembly, the court records of first offenders are, subject to the requirement in subsection (a) of O.C.G.A. § 42-8-62 for a red ink marking on the records, public records subject to public inspection and viewing in the same manner as other records of criminal actions in the office of the clerk of the superior court. Thus, except as otherwise provided by law, these documents are public records which are subject to public viewing and inspection. 1991 Op. Att'y Gen. No. U91-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536. 21A Am. Jur. 2d, Criminal Law, §§ 946-956.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

42-8-63. Effect of discharge under article on eligibility for employment or appointment to office.

Except as otherwise provided in this article, a discharge under this article is not a conviction of a crime under the laws of this state and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector. (Ga. L. 1978, p. 1621, § 2.)

Law reviews. — For article, "Labor and Employment Law," see 53 Mercer L. Rev. 349 (2001).

JUDICIAL DECISIONS

Expungement upon completion of probation of the records of first offender treatment of criminal defendants runs contrary to the intent and the practical operation of the First Offender Act,

O.C.G.A. § 42-8-60 et seq. *State v. C.S.B.*, 250 Ga. 261, 297 S.E.2d 260 (1982).

Cited in *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Green v. State*, 169 Ga. App. 71, 311 S.E.2d 505 (1983).

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Employer using first offender discharge to disqualify job applicant. — O.C.G.A. § 42-8-62 prohibits an employer from using a discharge under the first

offender statute to disqualify a person in any application for employment or appointment in either the public or private sector; however, a discharge under the

first offender treatment does not insulate the employee from the appropriate personnel action for the underlying facts that supported the initial criminal action nor does it bar an employer from considering

the employee's guilty plea as an admission against interest in a subsequent personnel action. 1986 Op. Att'y Gen. No. U86-25.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536. 21A Am. Jur. 2d, Criminal Law, §§ 946-956.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Judicial expunction of criminal record of convicted adult in absence of authorizing statute, 68 ALR6th 1.

Judicial expunction of criminal record of convicted adult under statute — General principles, and expunction of criminal records under statutes providing for such relief where criminal proceeding is terminated in favor of defendant, upon completion of probation, upon suspended sen-

tence, and where expungement relief predicated upon type, and number, of offenses, 69 ALR6th 1.

Judicial expunction of criminal record of convicted adult under statute — Expunction under statutes addressing "first offenders" and "innocent persons," where conviction was for minor drug or other offense, where indictment has not been presented against accused or accused has been released from custody, and where court considered impact of *nolle prosequi*, partial dismissal, pardon, rehabilitation, and lesser-included offenses, 70 ALR6th 1.

42-8-63.1. Discharges disqualifying individuals from employment.

(a) A discharge under this article may be used to disqualify a person for employment if:

(1) The offender was discharged under this article on or after July 1, 2004; and either

(2) The employment is with a public school, private school, child welfare agency, or a person or entity that provides day care for minor children or after school care for minor children and the defendant was discharged under this article after prosecution for the offense of child molestation, sexual battery, enticing a child for indecent purposes, sexual exploitation of a child, pimping, pandering, or incest;

(3) The employment is with a long-term care facility as defined in Code Section 31-8-51 or a person or entity that offers day care for elderly persons and the defendant was discharged under this article after prosecution for the offense of sexual battery, incest, pimping, pandering, or a violation of Article 8 of Chapter 5 of Title 16; or

(4) The request for information is an inquiry about a person who has applied for employment with a facility as defined in Code Section 37-3-1 or 37-4-2 that provides services to persons who are mentally ill as defined in Code Section 37-1-1 or developmentally disabled as defined in Code Section 37-1-1, and the person who is the subject of the inquiry to the center was prosecuted for the offense of sexual battery, incest, pimping, or pandering.

(b) Any discharge under this article may be used to disqualify a person from acquiring or maintaining a peace officer certification as provided for in Chapter 8 of Article 35 and also may disqualify a person from employment in a certified position with a law enforcement unit where the discharge under this article pertained to a felony offense or a crime involving moral turpitude. (Code 1981, § 42-8-63.1, enacted by Ga. L. 2003, p. 840, § 5; Ga. L. 2006, p. 164, § 2/HB 1335; Ga. L. 2009, p. 453, § 3-25/HB 228; Ga. L. 2011, p. 227, § 27/SB 178; Ga. L. 2013, p. 524, § 3-7/HB 78.)

The 2013 amendment, effective July 1, 2013, in paragraph (a)(3), substituted “long-term care facility as defined in Code Section 31-8-51” for “nursing home, assisted living community, personal care home,” near the beginning, and substituted “Article 8 of Chapter 5 of Title 16” for “Code Section 30-5-8” near the end.

Cross references. — Circumstances when exonerated first offender’s criminal record may be disclosed, § 35-3-34.1.

Law reviews. — For note on the 2003 enactment of this Code section, see 20 Ga. St. U.L. Rev. 179 (2003).

42-8-64. Appeal of sentence imposed under article.

A defendant sentenced pursuant to this article shall have the right to appeal in the same manner and with the same scope and same effect as if a judgment of conviction had been entered and appealed from. (Ga. L. 1968, p. 324, § 5.)

JUDICIAL DECISIONS

Need written order or judgment. — Court of Appeals lacks jurisdiction to entertain an appeal under O.C.G.A. § 5-6-34(a) from a conviction upon imposition of first-offender status absent a written trial court order imposing first offender status upon the defendant or a written judgment of conviction and sentence. *Littlejohn v. State*, 185 Ga. App. 31, 363 S.E.2d 327 (1987).

Direct appeal from conviction. — Section provides defendant direct appeal from conviction upon imposition of first-offender status, notwithstanding the absence of a formal and final “adjudication of guilt.” *Dean v. State*, 177 Ga. App. 123, 338 S.E.2d 711 (1985).

Appeal from revocation of probationary status granted under First Offender Act. — Appeal from adjudication of guilt and sentence serving to revoke probationary status granted under the First Offender Act, O.C.G.A. § 42-8-60

et seq., is by discretionary appeal, as provided in O.C.G.A. § 5-6-35(a)(5), rather than direct appeal. *Dean v. State*, 177 Ga. App. 123, 338 S.E.2d 711 (1985); *Anderson v. State*, 177 Ga. App. 130, 338 S.E.2d 716 (1985).

Failure to appeal accepted sentence. — Since the defendant was apparently satisfied with the defendant’s sentence at time the sentence was entered as the defendant did not appeal from the sentence as was the defendant’s right, and the defendant also readily accepted the benefits of first offender treatment and probation, the defendant will not be heard to complain that the fine was excessive. *Brainard v. State*, 246 Ga. 586, 272 S.E.2d 683 (1980).

Cited in *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536. 59 Am. Jur. 2d, Pardon and Parole, § 42.

C.J.S. — 24 C.J.S., Criminal Law, §§ 2144-2161.

ALR. — Acceptance of probation, parole, or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 ALR 929.

42-8-65. Use of prior finding of guilt in subsequent prosecutions; release of records of discharge; modification of records to reflect conviction; effect of confinement sentence where guilt not adjudicated.

(a) If otherwise allowable by law in any subsequent prosecution of the defendant for any other offense, a prior finding of guilt may be pleaded and proven as if an adjudication of guilt had been entered and relief had not been granted pursuant to this article.

(b) The records of the Georgia Crime Information Center shall be modified, without a court order, to show a conviction in lieu of treatment as a first offender under this article whenever the conviction of a person for another crime during the term of probation is reported to the Georgia Crime Information Center. If a report is made showing that such person has been afforded first offender treatment under this article on more than one occasion, the Georgia Crime Information Center may report information on first offender treatments subsequent to the first such first offender treatment as if they were convictions. Such records may be disseminated by the Georgia Crime Information Center in the same manner and subject to the same restrictions as any other records of convictions.

(c) Notwithstanding any other provision of this article, any person who is sentenced to a term of confinement pursuant to paragraph (2) of subsection (a) of Code Section 42-8-60 shall be deemed to have been convicted of the offense during such term of confinement for all purposes except that records thereof shall be treated as any other records of first offenders under this article and except that such presumption shall not continue after completion of such person's confinement sentence. Upon completion of the confinement sentence, such person shall be treated in the same manner and the procedures to be followed by the court shall be the same as in the case of a person placed on probation under this article. (Ga. L. 1968, p. 324, § 4; Ga. L. 1978, p. 1621, § 3; Ga. L. 1982, p. 1807, § 4; Ga. L. 1983, p. 3, § 31; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 380, § 2; Ga. L. 1990, p. 735, § 2; Ga. L. 1994, p. 97, § 42.)

Code Commission notes. — Ga. L. 1985, p. 380 cited "Code Section 40-8-60" in present subsection (c). Pursuant to

Code Section 28-9-5, this has been changed to "Code Section 42-8-60."
Editor's notes. — Ga. L. 1985, p. 380,

§ 3, not codified by the General Assembly, provided as follows: "Subsection (d) [now subsection (c)] of Code Section 42-8-65 of the Official Code of Georgia Annotated enacted by Section 2 of this Act shall be repealed upon the ratification of an

amendment to the Constitution extending the jurisdiction of the State Board of Pardons and Paroles to consider cases covered by Code Section 42-8-60." As of May, 2014, no vote had been taken on such a constitutional amendment.

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Prior first conviction under prior law considered. — Inasmuch as the defendant's first criminal proceeding was not handled under the "first offender" statute, which was not in effect at that time, the defendant was not eligible to claim the benefits which inure to those who are afforded treatment thereunder. Accordingly, the trial court did not err in considering the defendant's prior conviction in the sentencing phase of the present trial. *Woods v. State*, 187 Ga. App. 105, 369 S.E.2d 353 (1988).

Prior prosecution in which defendant given first offender treatment. — As a result of the changes made in 1985 to O.C.G.A. § 42-8-60, the use of a prior prosecution in which defendant was given first offender treatment and successfully completed the terms of the defendant's probated sentence is not "allowable by law" as provided in this section. Accordingly, this portion of the case in which the defendant was sentenced under O.C.G.A. § 17-10-7(a) had to be reversed and remanded for resentencing. *Queen v. State*, 182 Ga. App. 794, 357 S.E.2d 150 (1987) (holding Op. Att'y Gen. U81-32 incorrectly stated present law).

Although the modification of a defendant's first offender status by the Georgia Crime Information Center was authorized by O.C.G.A. § 42-8-65, it was not a conviction because only the trial court that imposed first offender probation was authorized to revoke that status. Thus, as the defendant was not shown to have been adjudicated guilty of the prior crimes, the state improperly impeached the defendant with evidence of the defendant's first offender record. *Lee v. State*, 294 Ga. App. 796, 670 S.E.2d 488 (2008).

Modification of records pursuant to subsection (b) of O.C.G.A. § 42-8-65 is not designed to punish the offender but to maintain an accurate statewide record of

offenders and it does not constitute punishment for purposes of double jeopardy analysis. *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

Use of prior first conviction in recidivist sentencing. — When, at the time of a recidivist sentencing, the period of probation on defendant's prior first offender sentence had expired with no revocation, the discharge was automatic and the first offender sentence was not a felony "conviction." The recidivist sentence was thus illegal, and since a challenge to the void sentence was not waived by defendant's failure to object, the sentence was vacated. *Headspeth v. State*, 266 Ga. App. 414, 597 S.E.2d 503 (2004).

Defendant eligible to serve ordered term of confinement. — Trial court did not err in denying the defendant's motion to correct an illegal sentence because, in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and, consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act, O.C.G.A. § 42-8-60 when the legislature enacted the State-Wide Probation Act. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

Cited in *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979); *Miller v. State*, 162 Ga. App. 730, 292 S.E.2d 102 (1982); *Tilley v. State*, 197 Ga. App. 97, 397 S.E.2d 506 (1990); *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Cases to which section applies. — Provision of O.C.G.A. § 42-8-65 regarding release of record of discharge applies to records in cases when a finding of guilt was made, pursuant to conviction or plea. 1981 Op. Att’y Gen. No. U81-32.

Confidentiality of first offender records. — Confidentiality provisions of the First Offender Act, O.C.G.A. § 42-8-60 et seq., having been repealed at the 1990 session of the General Assembly, the court

records of first offenders are, subject to the requirement in O.C.G.A. § 42-8-62(a) for a red ink marking on the records, public records subject to public inspection and viewing in the same manner as other records of criminal actions in the office of the clerk of the superior court. Thus, except as otherwise provided by law, these documents are public records which are subject to public viewing and inspection. 1991 Op. Att’y Gen. No. U91-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 526-536.

ALR. — What constitutes “minor traffic infraction” excludible from calculation of

defendant’s criminal history under United States sentencing guidelines § 4A1.2(c)(2), 113 ALR Fed. 561.

42-8-66. Applicability.

The provisions of this article shall not apply to any person who is convicted of a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1. (Code 1981, § 42-8-66, enacted by Ga. L. 1998, p. 180, § 3.)

Editor’s notes. — Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: “The General Assembly declares and finds: (1) That the ‘Sentence Reform Act of 1994,’ approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the ‘Sentence Reform Act of 1994,’ that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could

be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the ‘Sentence Reform Act of 1994’ shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment.”

Law reviews. — For review of 1998 legislation relating to penal institutions, see 15 Ga. St. U.L. Rev. 197 (1998).

For note, “Can’t Do the Time, Don’t Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia,” see 22 Ga. St. U.L. Rev. 519 (2005).

JUDICIAL DECISIONS

Applicability to offenses committed before 1998. — Since the serious violent felonies committed by defendant occurred

prior to the March 29, 1998, amendment to O.C.G.A. § 17-10-6.1 and the enactment of O.C.G.A. § 42-8-66, then the pro-

hibition of § 42-8-66 had no retroactive application to the defendant to limit the discretion of the trial judge in the sentence to impose. *Camaron v. State*, 246 Ga. App. 80, 539 S.E.2d 577 (2000).

Sentences for violent felonies. — The First Offender Act, O.C.G.A. § 42-8-60 et seq., does not apply to the sentences for violent felonies outlined in O.C.G.A. § 17-10-6.1. *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), overruling *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

Defendant found guilty of a serious violent felony under O.C.G.A. § 17-10-6.1 could apply for first offender status prior to the 1998 amendments to O.C.G.A. Art. 3, Ch. 8, T. 42 and § 42-8-66. *Fleming v. State*, 271 Ga. 587, 523 S.E.2d 315 (1999), reversing *Fleming v. State*, 233 Ga. App.

483, 504 S.E.2d 542 (1998), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998). *Horton v. State*, 241 Ga. App. 605, 527 S.E.2d 254 (1999).

There was no error in the trial court's failure to convict the defendant of kidnapping and armed robbery, in violation of O.C.G.A. §§ 16-5-40 and 16-8-41, respectively, under the First Offender Act, as O.C.G.A. § 42-8-66 specifically stated that the Act did not apply to the sentences for violent felonies outlined in O.C.G.A. § 17-10-6.1, and those two crimes were listed as serious violent felonies. *Isaac v. State*, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

Cited in *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998); *Burleson v. State*, 233 Ga. App. 769, 505 S.E.2d 515 (1998).

ARTICLE 4

PARTICIPATION OF PROBATIONERS IN COMMUNITY SERVICE PROGRAMS

42-8-70. Definitions; unlawful to use offender for private gain except under certain circumstances; penalties.

(a) As used in this article, the term:

(1) "Agency" means any private or public agency or organization approved by the court to participate in a community service program.

(2) "Community service" means uncompensated work by an offender with an agency for the benefit of the community pursuant to an order by a court as a condition of probation. Such term also means uncompensated service by an offender who lives in the household of a disabled person and provides aid and services to such disabled individual, including, but not limited to, cooking, housecleaning, shopping, driving, bathing, and dressing.

(3) "Community service officer" means an individual appointed by the court to place and supervise offenders sentenced to community service. Such term may mean a paid professional or a volunteer.

(b) Except as provided in subsection (c) of this Code section, it shall be unlawful for an agency or community service officer to use or allow an offender to be used for any purpose resulting in private gain to any individual.

(c) Subsection (b) of this Code section shall not apply to:

(1) Services provided by an offender to a disabled person in accordance with paragraph (1) of subsection (c) of Code Section 42-8-72;

(2) Work on private property because of a natural disaster; or

(3) An order or direction by the sentencing judge.

(d) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1982, p. 1257, § 1; Code 1981, § 42-8-70, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 3, § 31; Ga. L. 1983, p. 1593, § 1; Ga. L. 1991, p. 1302, § 1.)

Law reviews. — For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

JUDICIAL DECISIONS

Cited in *Currid v. DeKalb State Court*
Prob. Dep't, 285 Ga. 184, 674 S.E.2d 894
(2009).

OPINIONS OF THE ATTORNEY GENERAL

Community service not authorized for unemployment fraud. — O.C.G.A. Ch. 8, T. 42 does not authorize the imposition of a criminal sentence for unemployment fraud that permits community service in lieu of restitution of overpaid benefits to the Department of Labor. 1993 Op. Att'y Gen. No. 93-15.

Use of persons in care of cemeteries. — Persons sentenced to community service may be utilized to assist counties or municipalities in the care of abandoned cemeteries or burial grounds. 1999 Op. Att'y Gen. No. U99-5.

42-8-71. Application for participation in community service program; assignment of offenders; violations of court orders or article; limitation of liability.

(a) Agencies desiring to participate in a community service program shall file with the court a letter of application showing:

- (1) Eligibility;
- (2) Number of offenders who may be placed with the agency;
- (3) Work to be performed by the offender; and
- (4) Provisions for supervising the offender.

(b) An agency selected for the community service program shall work offenders who are assigned to the agency by the court. If an offender violates a court order, the agency shall report such violation to the community service officer.

(c) If an agency violates any court order or provision of this article, the offender shall be removed from the agency and the agency shall no longer be eligible to participate in the community service program.

(d) No agency or community service officer shall be liable at law as a result of any of his acts performed while participating in a community service program. This limitation of liability does not apply to actions on the part of any agency or community service officer which constitute gross negligence, recklessness, or willful misconduct. (Ga. L. 1982, p. 1257, § 2; Code 1981, § 42-8-71, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1984, p. 592, § 1.)

Law reviews. — For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006).

JUDICIAL DECISIONS

Immunity from liability. — First sentence of subsection (d) is construed to mean that immunity is given to any “agency” approved by the court to participate in a community service program or to any “community service officer” appointed by the court. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

When the Department of Human Resources, an agency under the Community Service Act, was found liable for an injury to a probationer on the basis of the ordinary negligence of the Department’s employees, the Department was entitled to the immunity granted by subsection (d). *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

Immunity extended to Department of Human Resources, an agency under the Community Service Act, was not forfeited by the department’s failure to comply with the other requirements of O.C.G.A. § 42-8-71 relating to application by an agency for participation in a community service program. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

Immunity granted under subsection (d) of O.C.G.A. § 42-8-71 to agencies approved for participation in community service programs promotes a public policy that was not superseded or repealed by implication by the 1991 constitutional

amendment (Ga. Const. 1983, Art. I, Sec. II, Par. IX (e)), providing for waiver of the state’s sovereign immunity or by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., enacted pursuant to the amendment. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

When a community service participant was assigned to work for the county sanitation department and was killed after falling from the back of a garbage truck while doing this work, no liability could be assigned for assigning the participant to work for the department as the department was properly authorized to participate in the community service program, but the facts that the participant was not issued safety shoes issued to department employees and was told to ride on the back of the truck, even though the truck was going over 10 miles per hour on a busy highway, contrary to department policy, created a fact issue as to the county’s gross negligence, under O.C.G.A. § 51-1-4, and willful misconduct; therefore, the county was not entitled to summary judgment under O.C.G.A. § 42-8-71(d). *Currid v. DeKalb State Court Prob. Dep’t*, 274 Ga. App. 704, 618 S.E.2d 621 (2005).

When a community service participant was assigned to work for the county sanitation department and was killed after falling from the back of a garbage truck while doing this work, the Department of

Corrections and the Department's employee were not shown to be liable, nor was a county employee involved in assigning the participant to work for the sanitation department as the employees were immune under O.C.G.A. § 42-8-71(d) and a waiver of liability the participant signed. *Currid v. DeKalb State Court Prob. Dep't*, 274 Ga. App. 704, 618 S.E.2d 621 (2005).

When a decedent fell off a sanitation truck while performing court-ordered community service, sovereign immunity barred a wrongful death claim against a county under the Community Service Act; O.C.G.A. § 42-8-71(d) does not specifically provide either that sovereign immunity is waived or the extent of the waiver,

as required by Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the court cannot read such a waiver into the act. *DeKalb State Court Prob. Dep't v. Currid*, 287 Ga. App. 649, 653 S.E.2d 90 (2007), *aff'd*, *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

County did not waive sovereign immunity under O.C.G.A. § 42-8-71(d) of the Community Service Act in a wrongful death action because the plain language did not expressly waive sovereign immunity or provide for the extent of any waiver. Thus, neither prong of the constitutional test under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) were met. *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

42-8-72. Community service as condition of probation; determination of appropriateness of community service for particular offender; service as live-in attendant for disabled person; community service in lieu of incarceration; community service as discipline.

(a) Community service may be considered as a condition of probation with primary consideration given to the following categories of offenders:

- (1) Traffic violations;
- (2) Ordinance violations;
- (3) Noninjurious or nondestructive, nonviolent misdemeanors;
- (4) Noninjurious or nondestructive, nonviolent felonies; and
- (5) Other offenders considered upon the discretion of the judge.

(b) The judge may confer with the prosecutor, defense attorney, probation supervisor, community service officer, or other interested persons to determine if the community service program is appropriate for an offender. If community service is ordered as a condition of probation, the court shall order:

(1) Not less than 20 hours nor more than 250 hours in cases involving traffic or ordinance violations or misdemeanors, said service to be completed within one year; or

(2) Not less than 20 hours nor more than 500 hours in felony cases, said service to be completed within three years.

(c)(1) Any agency may recommend to the court that certain disabled persons are in need of a live-in attendant. The judge shall confer with

the prosecutor, defense attorney, probation supervisor, community service officer, or other interested persons to determine if a community service program involving a disabled person is appropriate for an offender. If community service as a live-in attendant for a disabled person is deemed appropriate and if both the offender and the disabled person consent to such service, the court may order such live-in community service as a condition of probation but for no longer than two years.

(2) The agency shall be responsible for coordinating the provisions of the cost of food or other necessities for the offender which the disabled person is not able to provide. The agency, with the approval of the court, shall determine a schedule which will provide the offender with certain free hours each week.

(3) Such live-in arrangement shall be terminated by the court upon the request of the offender or the disabled person. Upon termination of such an arrangement, the court shall determine if the offender has met the conditions of probation.

(4) The appropriate agency shall make personal contact with the disabled person on a frequent basis to ensure the safety and welfare of the disabled person.

(d) The judge may order an offender to perform community service hours in a 40 hour per week work detail in lieu of incarceration.

(e) Community service hours may be added to original court ordered hours as a disciplinary action by the court, as an additional requirement of any program in lieu of incarceration, or as part of the sentencing options system as set forth in Article 9 of this chapter. (Ga. L. 1982, p. 1257, § 3; Code 1981, § 42-8-72, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 1593, § 2; Ga. L. 1989, p. 331, § 1; Ga. L. 1995, p. 396, § 1; Ga. L. 2004, p. 775, § 6.)

Editor's notes. — Ga. L. 1995, p. 396, § 1, which would have amended subsection (a) and added new subsections (f) and (g), was never funded as required by Section 4 of that Act, did not become law, and

was repealed on May 14, 2003, by Ga. L. 2003, p. 140, § 42A.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).

JUDICIAL DECISIONS

Sentence held proper. — Following a conviction for speeding and failure to maintain lane, the defendant was properly sentenced to a fine of \$650 plus court costs, 12 months of probation, 40 hours of community service, and the completion of a defensive driver course, despite the prosecutor's recommendation of fewer

community service hours, because the sentence was authorized by O.C.G.A. § 17-10-3(a)(1), (d)(2) and (d)(4), as well as O.C.G.A. § 42-8-72(a)(1). *Harris v. State*, 272 Ga. App. 650, 613 S.E.2d 170 (2005).

Amount of community service improper. — Trial court erred by ordering

the defendant to perform 400 hours of community service as a condition of the defendant's probation because the 250-hour maximum limit for community service hours set forth in O.C.G.A.

§ 42-8-72(b)(1) specifically applied to cases involving traffic violations, not to each traffic violation or charge. *Jones v. State*, 308 Ga. App. 99, 706 S.E.2d 593 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Contribution by probationer for probation supervisors' insurance. — Probationer can be required to pay by court order, as a condition of his/her probation, a reasonable amount toward the cost of maintaining insurance to protect probation supervisors from personal liability should probationers be injured while performing court-ordered community service. 1983 Op. Att'y Gen. No. 83-18.

Condition prohibiting suing probation supervisors personally. — Sentencing court may, in the court's discretion, require a probationer to enter into, as a condition of probation, a covenant not to sue probation supervisors in their personal capacity if the probationer is injured

while performing court-ordered community service work. 1983 Op. Att'y Gen. No. 83-18.

Liability for probationers' injuries. — Department of Offender Rehabilitation (Corrections) employees, authorized by law to supervise probationers while the probationers are performing approved court-ordered tasks under O.C.G.A. §§ 42-8-71, 42-8-72, and 42-8-73 and this section are performing a governmental function as opposed to a ministerial task, and therefore will not be personally liable for injuries to the probationers sustained while performing the tasks unless the department employees' conduct is willful and wanton. 1983 Op. Att'y Gen. No. 83-18.

42-8-73. Placement of offender with appropriate agency; scheduling for employed offenders; supervision; evaluation.

The community service officer shall place an offender sentenced to community service as a condition of probation with an appropriate agency. The agency and work schedule shall be approved by the court. If the offender is employed at the time of sentencing or if the offender becomes employed after sentencing, the community service officer shall consider the offender's work schedule and, to the extent practicable, shall schedule the community service so that it will not conflict with the offender's work schedule. This shall not be construed as requiring the community service officer to alter scheduled community service based on changes in an offender's work schedule. The community service officer shall supervise the offender for the duration of the community service sentence. Upon completion of the community service sentence, the community service officer shall prepare a written report evaluating the offender's performance which will be used to determine if the conditions of probation have been satisfied. (Ga. L. 1982, p. 1257, § 4; Code 1981, § 42-8-73, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1984, p. 367, § 1.)

RESEARCH REFERENCES

ALR. — Probation officer's liability for negligent supervision of probationer, 44 ALR4th 638.

42-8-74. Applicability of Articles 2 and 3 of chapter; awarding of good-time allowance for offender providing live-in community service.

(a) The provisions of Article 2 of this chapter, relating to probation, termination of probation, and revocation of probation, shall be applicable to offenders sentenced to community service as a condition of probation pursuant to this article. The provisions of Article 3 of this chapter, relating to probation of first offenders, shall be applicable to first offenders sentenced pursuant to this article.

(b) Any offender who provides live-in community service but who is later incarcerated for breaking the conditions of probation or for any other cause may be awarded good time for each day of live-in community service the same as if such offender was in prison for such number of days. (Ga. L. 1982, p. 1257, § 5; Code 1981, § 42-8-74, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 3, § 31; Ga. L. 1983, p. 1593, § 3.)

ARTICLE 5

PRETRIAL RELEASE AND DIVERSION PROGRAMS

Editor's notes. — Section 3 of the 1984 Act that enacted this article provided as follows: "Provided, however, no person shall be released on his own recognizance or approved for said program, without first having the approval, in writing, of

the judge of the court having jurisdiction of the case." This section of the 1984 Act was not codified by the General Assembly. See, however, Code Section 42-8-84, part of a 1985 Act to correct errors and omissions in the Code.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 34 et seq.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 115 et seq.

42-8-80. Establishment and operation; rules and regulations.

The Department of Corrections shall be authorized to establish and operate pretrial release and diversion programs as rehabilitative measures for persons charged with felonies for which bond is permissible under the law in the courts of this state prior to conviction; provided, however, that no such program shall be established in a county without the unanimous approval of the superior court judges, the district attorney, and the sheriff of such county. The Board of Corrections shall promulgate rules and regulations governing any pretrial release and

diversion programs established and operated by the department and shall grant authorization for the establishment of such programs based on the availability of sufficient staff and resources. (Code 1981, § 42-8-80, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1996, p. 748, § 23; Ga. L. 2000, p. 1643, § 3.)

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: "The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

42-8-81. Release of person charged to program.

The court in which a person is charged with a felony for which bond is permissible under the law may, upon the application by the person so charged, at its discretion release the person prior to conviction and upon recognizance to the supervision of a pretrial release or diversion program established and operated by the Department of Corrections after an investigation and upon recommendation of the staff of the pretrial release or diversion program. In no case, however, shall any person be so released unless after consultation with his or her attorney or an attorney made available to the person if he or she is indigent that person has voluntarily agreed to participate in the pretrial release or diversion program and knowingly and intelligently has waived his or her right to a speedy trial for the period of pretrial release or diversion. (Code 1981, § 42-8-81, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 2000, p. 1643, § 4.)

42-8-82. Contracts with counties for services and facilities.

The Department of Corrections may contract with the various counties of this state for the services and facilities necessary to operate pretrial release and diversion programs established under this article and both the department and the counties are authorized to enter into such contracts as are appropriate to carry out the purpose of this article. (Code 1981, § 42-8-82, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1.)

42-8-83. Pretrial intervention programs.

The authority to establish and operate pretrial release and diversion programs granted to the Department of Corrections under this article shall not affect the authority of the Georgia Department of Labor to enter into agreements with district attorneys of the several judicial circuits of this state for the purpose of establishing and operating pretrial intervention programs in such judicial circuits. (Code 1981, § 42-8-83, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 708, § 17.)

42-8-84. Approval required for release.

No person shall be released on his own recognizance or approved for a pretrial release and diversion program without first having the approval in writing of the judge of the court having jurisdiction of the case. (Code 1981, § 42-8-84, enacted by Ga. L. 1985, p. 149, § 42.)

ARTICLE 6**AGREEMENTS FOR PROBATION SERVICES**

Cross references. — Payments into the Georgia Crime Victims Emergency Fund, T. 17, C. 15.

Administrative rules and regulations. — Probation Services, Official

Compilation of the Rules and Regulations of the State of Georgia, County and Municipal Probation Advisory Council, Chapter 503-1.

42-8-100. Jurisdiction of probation matters in ordinance violation cases; costs; agreements between chief judges of county courts or judges of municipal courts and corporations, enterprises, or agencies for probation services.

(a) As used in this article, the term:

(1) "Council" means the County and Municipal Probation Advisory Council created under Code Section 42-8-101.

(2) "Private probation officer" means a probation officer employed by a private corporation, private enterprise, private agency, or other private entity that provides probation services.

(3) "Probation officer" means a person employed to supervise defendants placed on probation by a county or municipal court for committing an ordinance violation or misdemeanor.

(b) Any county or municipal court which has original jurisdiction of ordinance violations or misdemeanors and in which the defendant in such a case has been found guilty upon verdict or any plea may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(c) If it appears to the court upon a hearing of the matter that the defendant is not likely to engage in an unlawful course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon the defendant but may stay and suspend the execution of the sentence or any portion thereof or may place him or her on probation under the supervision and control of a probation officer for the duration of such probation, subject to the provisions of this Code section. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed on the defendant.

(d) The court may, in its discretion, require the payment of a fine or costs, or both, as a condition precedent to probation.

(e) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of his or her probated sentence. The judge is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence at any time during the period of time originally prescribed for the probated sentence to run.

(f) If a defendant is placed on probation pursuant to this Code section by a county or municipal court other than one for the county or municipality in which he or she resides for committing any ordinance violation or misdemeanor, such defendant may, when specifically ordered by the court, have his or her probation supervision transferred to the county or municipality in which he or she resides.

(g)(1) The chief judge of any court within the county, with the approval of the governing authority of that county, is authorized to enter into written contracts with corporations, enterprises, or agencies to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the

sentence imposed on the defendant as well as any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in that court and placed on probation in the county. In no case shall a private probation corporation or enterprise be charged with the responsibility for supervising a felony sentence. The final contract negotiated by the chief judge with the private probation entity shall be attached to the approval by the governing authority of the county to privatize probation services as an exhibit thereto. The termination of a contract for probation services as provided for in this subsection entered into on or after July 1, 2001, shall be initiated by the chief judge of the court which entered into the contract, and subject to approval by the governing authority of the county which entered into the contract and in accordance with the agreed upon, written provisions of such contract. The termination of a contract for probation services as provided for in this subsection in existence on July 1, 2001, and which contains no provisions relating to termination of such contract shall be initiated by the chief judge of the court which entered into the contract, and subject to approval by the governing authority of the county which entered into the contract and in accordance with the agreed upon, written provisions of such contract.

(2) The chief judge of any court within the county, with the approval of the governing authority of that county, is authorized to establish a county probation system to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed on the defendant as well as any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in that court and placed on probation in the county.

(h)(1) The judge of the municipal court of any municipality or consolidated government of a municipality and county of this state, with the approval of the governing authority of that municipality or consolidated government, is authorized to enter into written contracts with private corporations, enterprises, or agencies to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed and any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in such court and placed on probation. The final contract negotiated by the judge with the private probation entity shall be attached to the approval by the governing authority of the municipality or consolidated government to privatize probation services as an exhibit thereto.

(2) The judge of the municipal court of any municipality or consolidated government of a municipality and county of this state,

with the approval of the governing authority of that municipality or consolidated government, is authorized to establish a probation system to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed and any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in such court and placed on probation. (Code 1981, § 42-8-100, enacted by Ga. L. 1991, p. 1135, § 2; Ga. L. 1992, p. 3221, § 7; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 2; Ga. L. 2000, p. 1554, § 2; Ga. L. 2001, p. 813, § 2; Ga. L. 2006, p. 727, § 2/SB 44.)

Editor's notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

Law reviews. — For annual survey of

local government law, see 56 Mercer L. Rev. 351 (2004).

For note, "Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System," see 48 Ga. L. Rev. 227 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Intergovernmental agreements for probation services are legal in instances in which the contracting parties are authorized by law to provide probation services. Also, when providing probation services for a judicial circuit, a probation

entity must be authorized to provide the service and must enter into separate agreements with the court of each county that composes that judicial circuit. 2012 Op. Att'y Gen. No. 12-7.

42-8-101. County and Municipal Probation Advisory Council.

(a) There is created the County and Municipal Probation Advisory Council, to be composed of one superior court judge designated by The Council of Superior Court Judges of Georgia, one state court judge designated by The Council of State Court Judges of Georgia, one municipal court judge designated by the Council of Municipal Court Judges of Georgia, one sheriff appointed by the Governor, one probate court judge designated by The Council of Probate Court Judges of Georgia, one magistrate designated by the Council of Magistrate Court Judges, the commissioner of corrections or his or her designee, one public probation officer appointed by the Governor, one private probation officer or individual with expertise in private probation services by virtue of his or her training or employment appointed by the Governor, one mayor or member of a municipal governing authority appointed by the Governor, and one county commissioner appointed by the Governor. Members of the council appointed by the Governor shall be appointed for terms of office of four years. With the exceptions of the public probation officer, the county commissioner, the sheriff, the mayor or member of a municipal governing authority, and the commissioner of

corrections, each designee or representative shall be employed in their representative capacity in a judicial circuit operating under a contract with a private corporation, enterprise, or agency as provided under Code Section 42-8-100. No person shall serve beyond the time he or she holds the office or employment by reason of which he or she was initially eligible for appointment. In the event of death, resignation, disqualification, or removal for any reason of any member of the council, the vacancy shall be filled in the same manner as the original appointment and any successor shall serve for the unexpired term. Such council shall promulgate rules and regulations regarding contracts or agreements for the provision of probation services and the conduct of business by private entities providing probation services and county, municipal, or consolidated governments establishing probation systems as authorized by this article.

(b) The business of the council shall be conducted in the following manner:

(1) The council shall annually elect a chairperson and a vice chairperson from among its membership. The offices of chairperson and vice chairperson shall be filled in such a manner that they are not held in succeeding years by representatives of the same component (law enforcement, courts, corrections) of the criminal justice system;

(2) The council shall meet at such times and places as it shall determine necessary or convenient to perform its duties. The council shall also meet on the call of the chairperson or at the written request of three of its members;

(3) The council shall maintain minutes of its meetings and such other records as it deems necessary; and

(4) The council shall adopt such rules for the transaction of its business as it shall desire and may appoint such committees as it considers necessary to carry out its business and duties.

(c) Members of the council shall serve without compensation but shall receive the same expense allowance per day as that received by a member of the General Assembly for each day such member of the council is in attendance at a meeting of such council, plus either reimbursement for actual transportation costs while traveling by public carrier or the same mileage allowance for use of a personal motor vehicle in connection with such attendance as members of the General Assembly receive. Payment of such expense and travel allowance shall be subject to availability of funds and shall be in lieu of any per diem, allowance, or other remuneration now received by any such member for such attendance.

(d) The council is assigned to the Administrative Office of the Courts for administrative purposes only in accordance with Code Section

50-4-3. The funds necessary to carry out the provisions of this article shall come from funds appropriated to the Administrative Office of the Courts or otherwise available to the council. The council is authorized to accept and use grants of funds for the purpose of carrying out the provisions of this article.

(e) The council shall have the following powers and duties:

(1) To promulgate rules and regulations for the administration of the council, including rules of procedure for its internal management and control;

(2) To review the uniform professional standards for private probation officers and uniform contract standards for private probation contracts established in Code Section 42-8-102 and submit a report with its recommendations to the General Assembly;

(3) To promulgate rules and regulations to implement those uniform professional standards for probation officers employed by a governing authority of a county, municipality, or consolidated government that has established probation services and uniform agreement standards for the establishment of probation services by a county, municipality, or consolidated government established in Code Section 42-8-102;

(4) To promulgate rules and regulations establishing a 40 hour initial orientation for newly hired private probation officers and for 20 hours per annum of continuing education for private probation officers, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Georgia Peace Officer Standards and Training Council or any private probation officer who has been employed by a private probation corporation, enterprise, or agency for at least six months as of July 1, 1996;

(5) To promulgate rules and regulations establishing a 40 hour initial orientation for probation officers employed by a county, municipality, or consolidated government that has established probation services and for 20 hours per annum of continuing education for such probation officers, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Georgia Peace Officer Standards and Training Council or any probation officer who has been employed by a county, municipality, or consolidated government as of March 1, 2006;

(6) To promulgate rules and regulations relative to compliance with the provisions of this article, and enforcement mechanisms that may include, but are not limited to, the imposition of sanctions and fines and the voiding of contracts or agreements;

(7) To promulgate rules and regulations establishing registration for any private corporation, private enterprise, private agency, county, municipality, or consolidated government providing probation services under the provisions of this article, subject to the provisions of Code Section 42-8-107;

(8) To produce an annual summary report. Such report shall not contain information identifying individual private corporations, non-profit corporations, or enterprises or their contracts; and

(9) To promulgate rules and regulations requiring criminal record checks of private probation officers registered under this Code section and establishing procedures for such criminal record checks. The Administrative Office of the Courts on behalf of the council shall conduct a criminal records check for probation officers as provided in Code Section 35-3-34. No applicant shall be registered who has previously been convicted of a felony. The council shall promulgate rules and regulations regarding registration requirements, including restrictions regarding misdemeanor convictions. An agency or private entity shall also be authorized to conduct a criminal history background check of a person employed as a probation officer or an applicant for a probation officer position. The criminal history check may be conducted in accordance with Code Section 35-3-34 and may be based upon the submission of fingerprints of the person whose records are requested. The Georgia Bureau of Investigation shall submit the fingerprints to the Federal Bureau of Investigation under the rules established by the United States Department of Justice for processing and identification of records. The federal record, if any, shall be obtained and returned to the requesting entity or agency. (Code 1981, § 42-8-101, enacted by Ga. L. 1991, p. 1135, § 2; Ga. L. 1992, p. 3221, § 8; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, §§ 3, 4; Ga. L. 1997, p. 692, § 1; Ga. L. 2006, p. 727, § 2/SB 44.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, “The Council” was substituted for “the Council” three times in the first sentence and “of Georgia” was inserted three times in the first sentence of what is now subsection (a).

Editor’s notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

42-8-102. Uniform professional standards and uniform contract standards.

(a) The uniform professional standards contained in this subsection shall be met by any person employed as and using the title of a private probation officer or probation officer. Any such person shall be at least 21 years of age at the time of appointment to the position of private probation officer or probation officer and must have completed a

standard two-year college course or have four years of law enforcement experience; provided, however, that any person employed as a private probation officer as of July 1, 1996, and who had at least six months of experience as a private probation officer or any person employed as a probation officer by a county, municipality, or consolidated government as of March 1, 2006, shall be exempt from such college requirements. Every private probation officer shall receive an initial 40 hours of orientation upon employment and shall receive 20 hours of continuing education per annum as approved by the council, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Peace Officer Standards and Training Council or any private probation officer who has been employed by a private probation corporation, enterprise, or agency for at least six months as of July 1, 1996, or any person employed as a probation officer by a county, municipality, or consolidated government as of March 1, 2006. In no event shall any person convicted of a felony be employed as a probation officer or utilize the title of probation officer.

(b) The uniform contract standards contained in this subsection shall apply to all private probation contracts executed under the authority of Code Section 42-8-100. The terms of any such contract shall state, at a minimum:

- (1) The extent of the services to be rendered by the private corporation or enterprise providing probation supervision;
- (2) Any requirements for staff qualifications, to include those contained in this Code section as well as any surpassing those contained in this Code section;
- (3) Requirements for criminal record checks of staff in accordance with the rules and regulations established by the council;
- (4) Policies and procedures for the training of staff that comply with rules and regulations promulgated by the council;
- (5) Bonding of staff and liability insurance coverage;
- (6) Staffing levels and standards for offender supervision, including frequency and type of contacts with offenders;
- (7) Procedures for handling the collection of all court ordered fines, fees, and restitution;
- (8) Procedures for handling indigent offenders to ensure placement of such indigent offenders irrespective of the ability to pay;
- (9) Circumstances under which revocation of an offender's probation may be recommended;

(10) Reporting and record-keeping requirements; and

(11) Default and contract termination procedures.

(c) The uniform contract standards contained in this subsection shall apply to all counties, municipalities, and consolidated governments that enter into agreements with a judge to provide probation services under the authority of Code Section 42-8-100. The terms of any such agreement shall state at a minimum:

(1) The extent of the services to be rendered by the local governing authority providing probation services;

(2) Any requirements for staff qualifications, to include those contained in this Code section;

(3) Requirements for criminal record checks of staff in compliance with the rules and regulations established by the council;

(4) Policies and procedures for the training of staff that comply with the rules and regulations established by the council;

(5) Staffing levels and standards for offender supervision, including frequency and type of contacts with offenders;

(6) Procedures for handling the collection of all court ordered fines, fees, and restitution;

(7) Circumstances under which revocation of an offender's probation may be recommended;

(8) Reporting and record-keeping requirements; and

(9) Default and agreement termination procedures.

(d) The council shall review the uniform professional standards and uniform contract and agreement standards contained in subsections (a), (b), and (c) of this Code section and shall submit a report on its findings to the General Assembly. The council shall submit its initial report on or before January 1, 2007, and shall continue such reviews every two years thereafter. Nothing contained in such report shall be considered to authorize or require a change in the standards without action by the General Assembly having the force and effect of law. This report shall provide information which will allow the General Assembly to review the effectiveness of the minimum professional standards and, if necessary, to revise these standards. This subsection shall not be interpreted to prevent the council from making recommendations to the General Assembly prior to its required review and report. (Code 1981, § 42-8-102, enacted by Ga. L. 1992, p. 1465, § 1; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 5; Ga. L. 2006, p. 727, § 2/SB 44.)

Editor's notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

42-8-103. Quarterly report to judge and council; records to be open for inspection.

(a) Any private corporation, private enterprise, or private agency contracting to provide probation services or any county, municipality or consolidated government entering into an agreement under the provisions of this article shall provide to the judge with whom the contract or agreement was made and the council a quarterly report summarizing the number of offenders under supervision; the amount of fines, statutory surcharges, and restitution collected; the number of offenders for whom supervision or rehabilitation has been terminated and the reason for the termination; and the number of warrants issued during the quarter, in such detail as the council may require.

(b) All records of any private corporation, private enterprise, or private agency contracting to provide services or of any county, municipality, or consolidated government entering into an agreement under the provisions of this article shall be open to inspection upon the request of the affected county, municipality, consolidated government, court, the Department of Audits and Accounts, or the council or its designee. (Code 1981, § 42-8-103, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 2; Ga. L. 2006, p. 727, § 2/SB 44.)

Editor's notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

42-8-104. Conflicts of interests prohibited — private entities.

(a) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor any employees of such entities shall engage in any other employment, business, or activity which interferes or conflicts with the duties and responsibilities under contracts authorized in this article.

(b) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor its employees shall have personal or business dealings, including the lending of money, with probationers under their supervision.

(c)(1) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor any employees of such entities, shall own, operate, have any financial interest in, be an instructor at, or be employed by any

private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services.

(2) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor any employees of such entities shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit furnishing any probationer, upon request, with the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any person violating this paragraph shall be guilty of a misdemeanor. (Code 1981, § 42-8-104, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 6; Ga. L. 2005, p. 334, § 24-2/HB 501; Ga. L. 2006, p. 727, § 2/SB 44.)

Editor's notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

42-8-105. Conflicts of interests prohibited — public entities and employees prohibited from engaging in certain employment, business, or other activities that interfere with duties and responsibilities under this article.

(a) No county, municipality, or consolidated government probation officer or other probation office employee shall engage in any other employment, business, or activity which interferes or conflicts with the officer's or employee's duties and responsibilities under agreements authorized in this article.

(b) No county, municipality, or consolidated government probation officer or other probation office employee shall have personal or business dealings, including the lending of money, with probationers under the supervision of such probation office.

(c)(1) No county, municipality, or consolidated government probation officer or other probation office employee shall own, operate, have any financial interest in, be an instructor at, or be employed by any private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services.

(2) No county, municipality, or consolidated government that provides probation services through agreement under the provisions of this article nor any employees of such shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit furnishing any probationer, upon request, with the

names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any person violating this paragraph shall be guilty of a misdemeanor. (Code 1981, § 42-8-105, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 2006, p. 727, § 2/SB 44.)

Editor’s notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

42-8-106. Confidentiality of records.

(a) All reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation, private enterprise, or private agency contracting under the provisions of this article or by a county, municipality, or consolidated government providing probation services under this article are declared to be confidential and shall be available only to the affected county, municipality, or consolidated government, the judge handling a particular case, the Department of Audits and Accounts, or the council or its designee.

(b) In the event of a transfer of the supervision of a probationer from a private corporation, private enterprise, or private agency or county, municipality, or consolidated government providing probation services under this article to the Department of Corrections, the Department of Corrections shall have access to any relevant reports, files, records, and papers of the transferring entity. All reports, files, records, and papers of whatever kind relative to the supervision of probationers by private corporations, private enterprises, or private agencies under contracts authorized by this article or by a county, municipality, or consolidated government providing probation services under this article shall not be subject to process of subpoena. (Code 1981, § 42-8-106, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 3; Ga. L. 2006, p. 727, § 2/SB 44.)

Editor’s notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

Law reviews. — For note, “Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors’ Prison System,” see 48 Ga. L. Rev. 227 (2013).

42-8-107. Registration with council.

(a)(1) All private corporations, private enterprises, and private agencies contracting or offering to contract for probation services shall register with the council before entering into any contract to provide services. The information included in such registration shall include the name of the corporation, enterprise, or agency, its principal business address and telephone number, the name of its agent for

communication, and other information in such detail as the council may require. No registration fee shall be required.

(2) Any private corporation, private enterprise, or private agency required to register under the provisions of paragraph (1) of this subsection which fails or refuses to do so shall be subject to revocation of any existing contracts, in addition to any other fines or sanctions imposed by the council.

(b)(1) All counties, municipalities, and consolidated governments agreeing or offering to agree to establish a probation system shall register with the council before entering into an agreement with the court to provide services. The information included in such registration shall include the name of the county, municipality, or consolidated government, the principal business address and telephone number, a contact name for communication with the council, and other information in such detail as the council may require. No registration fee shall be required.

(2) Any county, municipality, or consolidated government required to register under the provisions of paragraph (1) of this subsection which fails or refuses to do so shall be subject to revocation of existing agreements, in addition to any other sanctions imposed by the council. (Code 1981, § 42-8-107, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 4; Ga. L. 2006, p. 727, § 2/SB 44; Ga. L. 2007, p. 363, § 1/HB 527.)

Editor's notes. — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

42-8-108. Applicability of article to contractors for probation services; requirements for private corporations, private enterprises and private agencies entering into written contracts for services.

(a) The probation providers standards contained in this Code section shall be met by private corporations, private enterprises, or private agencies who enter into written contracts for probation services under the authority of Code Section 42-8-100 on or after July 1, 2006. Any private corporation, private enterprise, or private agency which fails to meet the standards established in this subsection on or after July 1, 2006, shall not be eligible to provide probation services in this state. All private corporations, private enterprises, or private agencies who enter into written contracts for probation services under the authority of Code Section 42-8-100 on or after July 1, 2006, shall:

(1) Meet all requirements as outlined in subsection (b) of Code Section 42-8-102, relating to uniform contract standards;

(2) Not own or control any finance business or lending institution which makes loans to probationers under its supervision for the payment of probation fees or fines; and

(3) Employ at least one person who is responsible for the direct supervision of probation officers employed by the corporation, enterprise, or agency and who shall have at least five years' experience in corrections, parole, or probation services.

(b) The standards contained in this subsection shall be met by all counties, municipalities, or consolidated governments entering into written agreements to provide probation services to any court under the authority of Code Section 42-8-100 on or after July 1, 2006. Any county, municipality, or consolidated government which fails to meet the standards established in this subsection on or after July 1, 2006, shall not be eligible to provide probation services. All counties, municipalities, or consolidated governments which enter into written agreements to provide probation services under the authority of Code Section 42-8-100 on or after July 1, 2006, shall:

(1) Register with the council;

(2) Meet the requirements of subsection (c) of Code Section 42-8-102; and

(3) Employ at least one person who is responsible for the direct supervision of probation officers employed by the governing authority who shall have at least five years' experience in corrections, parole, or probation services; provided, however, that the five-year experience requirement shall not apply to any such supervisor employed by a county, municipality, or consolidated government which was engaged in the provision of probation services on April 15, 2006. (Code 1981, § 42-8-108, enacted by Ga. L. 1996, p. 1107, § 7; Ga. L. 2006, p. 727, § 2/SB 44.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "April 15, 1996" was substituted for "the effective date of this Code section" at the end of paragraph (3) (now paragraph (b)(3)).

ARTICLE 7

IGNITION INTERLOCK DEVICES AS PROBATION CONDITION

Administrative rules and regulations. — Ignition Interlock Devices, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Driver Services, Driver License Services, Chapter 375-3-6.

Law reviews. — For note on 1993 enactment of this article, see 10 Ga. St. U.L. Rev. 169 (1993). For note on 2000 amendments of O.C.G.A. §§ 42-8-110 to 42-8-118, see 17 Ga. St. U.L. Rev. 253 (2000).

42-8-110. Definitions; applicability; purchase or lease of ignition interlock devices by counties, municipalities, or private entities; costs, fees, and deposits; participation by indigents.

(a) As used in this article, the term “ignition interlock device” means a constant monitoring device certified by the commissioner of driver services which prevents a motor vehicle from being started at any time without first determining the equivalent blood alcohol concentration of the operator through the taking of a deep lung breath sample. The system shall be calibrated so that the motor vehicle may not be started if the blood alcohol concentration of the operator, as measured by the device, exceeds 0.02 grams or if the sample is not a sample of human breath.

(b) As used in this article, the term “provider center” means a facility established for the purpose of providing and installing ignition interlock devices when their use is required by or as a result of an order of a court.

(c) Ignition interlock devices for provider centers may be purchased or leased by counties, municipalities, or private entities.

(d) A provider center shall be authorized to charge the person whose vehicle is to be equipped with an ignition interlock device such installation, deinstallation, and user fees as are approved by the Department of Driver Services. A provider center may also require such person to make a security deposit for the safe return of the ignition interlock device. Payment of any or all of such fees and deposits may be made a condition of probation under this order.

(e) If a county, municipality, or other political subdivision of this state purchases or leases ignition interlock devices from a private entity, such county or municipality shall allow persons who are found by the court to be indigent and unable to pay the fees or deposits for such an ignition interlock device to participate in the ignition interlock program. (Code 1981, § 42-8-110, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 1997, p. 760, § 26; Ga. L. 1999, p. 391, § 11; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2005, p. 334, § 24-3/HB 501.)

Editor’s notes. — Ga. L. 1997, p. 760, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Teen-age and Adult Driver Responsibility Act.’”

Ga. L. 1999, p. 391, § 1, not codified by the General Assembly, provides that: “it is fitting to honor the memory of all victims of drunken driving and Heidi Marie Flye,

Cathryn Nicole Flye, and Audrey Marie Flye in particular by strengthening the laws requiring the installation and use of ignition interlock devices.”

Ga. L. 1999, p. 391, § 2, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as ‘Heidi’s Law.’”

Law reviews. — For article comment-

ing on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 203 (1997).

For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 200 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Private vendors may not establish provider centers. — O.C.G.A. § 42-8-110 et seq. does not allow municipal or county officials to contract with private vendors for the establishment of

interlock provider centers; rather, the applicable governmental unit is required to establish the centers. 1993 Op. Att'y Gen. No. 93-16.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of ignition interlock laws, 15 ALR6th 375.

42-8-111. Court issuance of certificate for installation of ignition interlock devices; exceptions; completion of alcohol and drug use risk reduction program; notice of requirements; fees for driver's license.

(a) Upon a second or subsequent conviction of a resident of this state for violating Code Section 40-6-391 within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, for which such person is granted probation, the court shall issue a certificate of eligibility for an ignition interlock device limited driving permit or probationary license, subject to the following conditions:

(1) Such person shall have installed and shall maintain in each motor vehicle registered in such person's name for a period of not less than one year a functioning, certified ignition interlock device;

(2) Such person shall have installed and shall maintain in any other motor vehicle to be driven by such person for a period of not less than one year a functioning, certified ignition interlock device, and such person shall not drive any motor vehicle whatsoever that is not so equipped during such period. Upon successful completion of one year of monitoring of such ignition interlock device, the restriction for maintaining and using such ignition interlock device shall be removed, and the permit may be renewed for additional periods of two months as provided in paragraph (1) of subsection (e) of Code Section 40-5-64; and

(3) Such person shall participate in a substance abuse treatment program as defined in paragraph (16.2) of Code Section 40-5-1 or a drug court program in compliance with Code Section 15-1-15 for a period of not less than 120 days.

For the purposes of this subsection, a plea of nolo contendere shall constitute a conviction; and a conviction of any offense under the law of another state or territory substantially conforming to any offense under Code Section 40-6-391 shall be deemed a conviction of violating said Code section.

(b) The court may, in its discretion, decline to issue a certificate of eligibility for an ignition interlock device limited driving permit or probationary license for any reason or exempt a person from any or all ignition interlock device requirements upon a determination that such requirements would subject such person to undue financial hardship. Notwithstanding any contrary provision of Code Section 40-13-32 or 40-13-33, a determination of financial hardship may be made at the time of conviction or any time thereafter. If a court grants an exemption from the ignition interlock device requirements, such person shall not be eligible for a limited driving permit or any other driving privilege for a period of one year.

(c) In the case of any person subject to the provisions of subsection (a) of this Code section, the court shall include in the record of conviction or violation submitted to the Department of Driver Services a copy of the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued by the court or documentation of the court's decision to decline to issue such certificate. Such certificate shall specify any exemption from the installation requirements of paragraph (1) of subsection (a) of this Code section and any vehicles subject to the installation requirements of paragraph (2) of such subsection. The records of the Department of Driver Services shall contain a record reflecting such certificate, and the person's driver's license, limited driving permit, or probationary license shall contain a notation that the person may only operate a motor vehicle equipped with a functioning, certified ignition interlock device.

(d) Except as provided in Code Section 42-8-112, no provision of this article shall be deemed to reduce any period of driver's license suspension or revocation otherwise imposed by law.

(e) The fee for issuance of any driver's license indicating that use of an ignition interlock device is required shall be as prescribed for a regular driver's license in Code Section 40-5-25, and the fee for issuance of any limited driving permit indicating that use of an ignition interlock device is required shall be as prescribed for a limited driving permit in Code Section 40-5-64; except that, for habitual violators required to use an ignition interlock device as a condition of a probationary license, the fee shall be as prescribed for a probationary license in Code Section 40-5-58.

(f) Exemptions granted due to financial hardship pursuant to paragraph (1) of subsection (a) of this Code section shall be exempt from the

subject matter jurisdiction limitations imposed in Code Sections 40-13-32 and 40-13-33. (Code 1981, § 42-8-111, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 1999, p. 391, § 12; Ga. L. 2000, p. 1457, § 6; Ga. L. 2001, p. 208, § 1-8; Ga. L. 2002, p. 415, § 42; Ga. L. 2003, p. 140, § 42; Ga. L. 2005, p. 334, § 24-4/HB 501; Ga. L. 2011, p. 355, § 19/HB 269; Ga. L. 2012, p. 72, § 6/SB 236; Ga. L. 2012, p. 775, § 42/HB 942; Ga. L. 2013, p. 878, § 3/HB 407.)

The 2012 amendments. — The first 2012 amendment, effective January 1, 2013, rewrote subsections (a) through (c), which read: “(a) In addition to any other provision of probation, upon a second or subsequent conviction of a resident of this state for violating Code Section 40-6-391 within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, for which such person is granted probation, the court shall order as conditions of probation that:

“(1) Such person shall have installed and shall maintain in each motor vehicle registered in such person’s name throughout the applicable six-month period prescribed by subsection (b) of Code Section 42-8-112 a functioning, certified ignition interlock device, unless the court exempts the person from the requirements of this paragraph based upon the court’s determination that such requirements would subject the person to undue financial hardship; and

“(2) Such person shall have installed and shall maintain in any other motor vehicle to be driven by such person during the applicable six-month period prescribed by subsection (b) of Code Section 42-8-112 a functioning, certified ignition interlock device, and such person shall not during such six-month period drive any motor vehicle whatsoever that is not so equipped.

“For the purposes of this subsection, a plea of *nolo contendere* shall constitute a conviction; and a conviction of any offense under the law of another state or territory substantially conforming to any offense under Code Section 40-6-391 shall be deemed a conviction of violating said Code section.

“(b) Any resident of this state who is ordered to use an ignition interlock device,

as a condition of probation, shall complete the DUI Alcohol or Drug Use Risk Reduction Program and submit to the court or probation department a certificate of completion of the DUI Alcohol or Drug Use Risk Reduction Program and certification of installation of a certified ignition interlock device to the extent required by subsection (a) of this Code section.

“(c) In the case of any person subject to the provisions of subsection (a) of this Code section, the court shall include in the record of conviction or violation submitted to the Department of Driver Services notice of the requirement for, and the period of the requirement for, the use of a certified ignition interlock device. Such notice shall specify any exemption from the installation requirements of paragraph (1) of subsection (a) of this Code section and any vehicles subject to the installation requirements of paragraph (2) of said subsection. The records of the Department of Driver Services shall contain a record reflecting mandatory use of such device and the person’s driver’s license or limited driving permit shall contain a notation that the person may only operate a motor vehicle equipped with a functioning, certified ignition interlock device.” The second 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (f).

The 2013 amendment, effective July 1, 2013, substituted “one year” for “eight months” in paragraph (a)(1) and twice in paragraph (a)(2); substituted “two months” for “six months” in the last sentence of paragraph (a)(2); and added the third sentence in subsection (b). See editor’s note for applicability.

Cross references. — Periods of suspension; conditions to return of license, § 40-5-63. Limited driving permits for certain offenders, § 40-5-64.

Editor's notes. — Ga. L. 1999, p. 391, § 1, not codified by the General Assembly, provides that: "it is fitting to honor the memory of all victims of drunken driving and Heidi Marie Flye, Cathryn Nicole Flye, and Audrey Marie Flye in particular by strengthening the laws requiring the installation and use of ignition interlock devices."

Ga. L. 1999, p. 391, § 2, not codified by the General Assembly, provides that:

"This Act shall be known and may be cited as 'Heidi's Law.'"

Ga. L. 2013, p. 878, § 5/HB 407, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses committed on or after such date."

Law reviews. — For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 200 (1999).

JUDICIAL DECISIONS

Imposition of ignition interlock device on second-time DUI offender mandatory. — O.C.G.A. § 42-8-111 is plain and susceptible of only one natural and reasonable construction, and that is that "shall" means that there is no discretion in the trial court to consider whether to impose an ignition interlock device as a condition of probation for a second time DUI offender, absent a showing of financial hardship; accordingly, a trial court erred in not imposing that condition of probation on the defendant, who had previously been convicted of a DUI offense and who entered a negotiated plea to driving under the influence of alcohol to the extent that the defendant was a less

safe driver in violation of O.C.G.A. § 40-6-391(a)(1). *State v. Villella*, 266 Ga. App. 499, 597 S.E.2d 563 (2004).

Failure to order. — Since defendant's sentence imposed upon a conviction for driving under the influence was more lenient than permitted under O.C.G.A. § 42-8-111, in that the trial court failed to order the defendant to install an ignition interlock device, the defendant could not complain on appeal that the trial court erred in failing to order the installation of such a device. *Winstead v. State*, 280 Ga. 605, 632 S.E.2d 86 (2006).

Cited in *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

42-8-112. Timing for issuance of ignition interlock device limited driving permit; documentation required; reporting requirement.

(a)(1) In any case where the court grants a certificate of eligibility for an ignition interlock device limited driving permit or probationary license pursuant to Code Section 42-8-111 to a person whose driver's license is suspended pursuant to subparagraph (b)(2)(C) of Code Section 40-5-57.1 or paragraph (2) of subsection (a) of Code Section 40-5-63, the Department of Driver Services shall not issue an ignition interlock device limited driving permit until after the expiration of 120 days from the date of the conviction for which such certificate was granted.

(2) The Department of Driver Services shall condition issuance of an ignition interlock device limited driving permit for such person upon receipt of acceptable documentation of the following:

(A) That the person to whom such permit is to be issued has completed a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services;

(B) That such person has completed a clinical evaluation as defined in Code Section 40-5-1 and enrolled in a substance abuse treatment program approved by the Department of Human Services or is enrolled in a drug court program;

(C) That such person has installed an ignition interlock device in any vehicle that he or she will be operating; and

(D) A certificate of eligibility for an ignition interlock device limited driving permit or probationary license from the court that sentenced such person for the conviction that resulted in the suspension or revocation of his or her driver's license for which he or she is applying for a limited driving permit or probationary license.

(b)(1) In any case where the court grants a certificate of eligibility for an ignition interlock device limited driving permit or probationary license pursuant to Code Section 42-8-111 to a person whose driver's license is revoked as a habitual violator pursuant to Code Section 40-5-58, the Department of Driver Services shall not issue a habitual violator probationary license until after the expiration of two years from the date of the conviction for which such certificate was granted.

(2) The Department of Driver Services shall condition issuance of a habitual violator probationary license for such person upon receipt of acceptable documentation of the following:

(A) That the person to whom such permit is to be issued has completed a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services;

(B) That such person has completed a clinical evaluation as defined in Code Section 40-5-1 and enrolled in a substance abuse treatment program approved by the Department of Human Services or is enrolled in a drug court program;

(C) That such person has installed an ignition interlock device in any vehicle that he or she will be operating; and

(D) A certificate of eligibility for an ignition interlock device limited driving permit or probationary license from the court that sentenced such person for the conviction that resulted in the suspension or revocation of his or her driver's license for which he or she is applying for a limited driving permit or probationary license.

(3) In any case where installation of an ignition interlock device is required, failure to show proof of such device shall be grounds for refusal of reinstatement of such license or issuance of such habitual violator's probationary license or the immediate suspension or revocation of such license.

(4) Any limited driving permit or probationary license issued to such person shall bear a restriction reflecting that the person may only operate a motor vehicle equipped with a functional ignition interlock device. No person whose limited driving permit or probationary license contains such restriction shall operate a motor vehicle that is not equipped with a functional ignition interlock device.

(5)(A) Any person who has been issued an ignition interlock device limited driving permit or a habitual violator probationary license bearing an ignition interlock device condition shall maintain such ignition interlock device in any motor vehicle he or she operates to the extent required by the certificate of eligibility for such permit or probationary license issued to such person by the court in which he or she was convicted for not less than one year.

(B) Upon the expiration of such one-year ignition interlock device limited driving permit or habitual violator probationary license, the driver may, if otherwise qualified, apply for renewal of such permit or probationary license without such ignition interlock device restriction.

(c) Each resident of this state who is required to have an ignition interlock device installed pursuant to this article shall report to the provider center every 30 days for the purpose of monitoring the operation of each required ignition interlock device. If at any time it is determined that a person has tampered with the device, the Department of Driver Services shall be given written notice within five days by the probation officer, the court ordering the use of such device, or the interlock provider. If an ignition interlock device is found to be malfunctioning, it shall be replaced or repaired, as ordered by the court or the Department of Driver Services, at the expense of the provider.

(d)(1) If a person required to report to an ignition interlock provider as required by subsection (c) of this Code section fails to report to the provider as required or receives an unsatisfactory report from the provider at any time during the one-year period, the Department of Driver Services shall revoke such person's ignition interlock device limited driving permit immediately upon notification from the provider of the failure to report or failure to receive a satisfactory report. Except as provided in paragraph (2) of this subsection, within 30 days after such revocation, the person may make a written request for a hearing and remit to the department a payment of \$250.00 for the cost of the hearing. Within 30 days after receiving a written request for a hearing and a payment of \$250.00, the Department of Driver Services shall hold a hearing as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The hearing shall be recorded.

(2) Any person whose ignition interlock device limited driving permit was revoked on or before July 1, 2004, for failure to report or

failure to receive a satisfactory report may make a written request for a hearing and remit to the department a payment of \$250.00 for the cost of the hearing. Within 30 days after receiving a written request for a hearing and a payment of \$250.00, the Department of Driver Services shall hold a hearing as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The hearing shall be recorded.

(3) If the hearing officer determines that the person failed to report to the ignition interlock provider for any of the reasons specified in this paragraph, the Department of Driver Services shall issue a new ignition interlock device limited driving permit that shall be valid for a period of one year to such person. Such reasons shall be for providential cause and shall include, but not be limited to, the following:

(A) Medical necessity, as evidenced by a written statement from a medical doctor;

(B) The person was incarcerated;

(C) The person was required to be on the job at his or her place of employment, with proof that the person would be terminated if he or she was not at work; or

(D) The vehicle with the installed interlock device was rendered inoperable by reason of collision, fire, or a major mechanical failure.

(4) If the hearing officer determines that the person failed to report to the ignition interlock provider for any reason other than those specified in paragraph (3) of this subsection, or if the person received an unsatisfactory report from the provider, after the expiration of 120 days the person may apply to the department and the department shall issue a new ignition interlock device limited driving permit to such person.

(5) This subsection shall not apply to any person convicted of violating Code Section 42-8-118. (Code 1981, § 42-8-112, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2001, p. 208, § 1-9; Ga. L. 2002, p. 415, § 42; Ga. L. 2003, p. 796, § 8; Ga. L. 2004, p. 604, § 1; Ga. L. 2005, p. 60, § 42/HB 95; Ga. L. 2005, p. 334, § 24-5/HB 501; Ga. L. 2012, p. 72, § 7/SB 236; Ga. L. 2013, p. 878, § 4/HB 407; Ga. L. 2014, p. 710, § 1-20/SB 298.)

The 2012 amendment, effective January 1, 2013, substituted the present provisions of subsections (a) and (b) for the former provisions, which read: "(a) In any case where the court imposes the use of an ignition interlock device as a condition of

probation on a resident of this state whose driving privilege is not suspended or revoked, the court shall require the person to surrender his or her driver's license to the court immediately and provide proof of compliance with such order to the court

or the probation officer and obtain an ignition interlock device restricted driving license within 30 days. Upon expiration of the period of time for which such person is required to use an ignition interlock device, the person may apply for and receive a regular driver's license upon payment of the fee provided for in Code Section 40-5-25. If such person fails to provide proof of installation to the extent required by subsection (a) of Code Section 42-8-111 and receipt of the restricted driving license within such period, absent a finding by the court of good cause for that failure, which finding is entered in the court's record, the court shall revoke or terminate the probation.

“(b)(1) In any case where the court imposes the use of an ignition interlock device as a condition of probation on a resident of this state whose driving privilege is suspended or revoked, the court shall require the person to provide proof of compliance with such order to the court or the probation officer and the Department of Driver Services not later than ten days after the date on which such person first becomes eligible to apply for an ignition interlock device limited driving permit in accordance with paragraph (2) of this subsection or a habitual violator's probationary license in accordance with paragraph (3) of this subsection, whichever is applicable. If such person fails to provide proof of installation to the extent required by subsection (a) of Code Section 42-8-111 within the period required by this subsection, absent a finding by the court of good cause for that failure, which finding is entered on the court's record, the court shall revoke or terminate the probation if such is still applicable.

“(2) If the person subject to court ordered use of an ignition interlock device as a condition of probation is authorized under Code Section 40-5-63 or 40-5-67.2 to apply for reinstatement of his or her driver's license during the period of suspension, such person shall, prior to applying for reinstatement of the license, have an ignition interlock device installed and shall maintain such ignition interlock device in a motor vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111 for a period of six months

running concurrently with that of an ignition interlock device limited driving permit, which permit shall not be issued until such person submits to the department proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program, proof of having undergone any clinical evaluation and of having enrolled in any substance abuse treatment program required by Code Section 40-5-63.1, and proof of installation of an ignition interlock device on a vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111. Such a person may apply for and be issued an ignition interlock device limited driving permit at the end of 12 months after the suspension of the driver's license. At the expiration of such six-month ignition interlock device limited driving permit, the driver may, if otherwise qualified, apply for reinstatement of a regular driver's license upon payment of the fee provided in Code Section 40-5-25.

“(3) If the person subject to court ordered use of an ignition interlock device as a condition of probation is authorized under Code Section 40-5-58 or under Code Section 40-5-67.2 to obtain a habitual violator's probationary license, such person shall, if such person is a habitual violator as a result of two or more convictions for driving under the influence of alcohol or drugs, have an ignition interlock device installed and maintained in a motor vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111 for a period of six months following issuance of the probationary license, and such person shall not during such six-month period drive any motor vehicle that is not so equipped, all as conditions of such probationary license. Following expiration of such six-month period with no violation of the conditions of the probationary license, the person may apply for a habitual violator probationary license without such ignition interlock device condition.

“(4) In any case where installation of an ignition interlock device is required, failure to show proof of such device shall be grounds for refusal of reinstatement of such license or issuance of such habitual violator's probationary license or the immediate suspension or revocation of such license.”

The 2013 amendment, effective July 1, 2013, in subsection (b), inserted “probationary” in the middle of subparagraph (b)(2)(A), substituted “one year” for “eight months” at the end of subparagraph (b)(5)(A), and substituted “one-year” for “eight-month” near the beginning of subparagraph (b)(5)(B); substituted “one-year” for “six-month” in the first sentence of paragraph (d)(1); in the introductory paragraph of paragraph (d)(3), substituted “specified in this paragraph” for “specified below” in the first sentence, inserted “shall” near the end of the second sentence, and substituted “one year” for “six months”. See editor’s note for applicability.

The 2014 amendment, effective July

1, 2014, added “certified by the Department of Driver Services” at the end of subparagraphs (a)(2)(A) and (b)(2)(A), and substituted “permit” for “probationary license” at the beginning of subparagraph (b)(2)(A).

Cross references. — Clinical evaluation and substance abuse treatment programs for certain offenders, § 40-5-63.1. Limited driving permits for certain offenders, § 40-5-64.

Editor’s notes. — Ga. L. 2013, p. 878, § 5/HB 407, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses committed on or after such date.”

OPINIONS OF THE ATTORNEY GENERAL

Condition required for refusal of reinstatement. — Department of Public Safety is required to deny reinstatement of a driver’s license or issuance of a probationary license for failure to provide proof of the installation of an ignition

interlock device only when the installation has been imposed as a condition of probation by a court in a county or municipality which has established a provider center. 1995 Op. Att’y Gen. No. 95-28.

JUDICIAL DECISIONS

Cited in *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

42-8-113. Renting, leasing, or lending motor vehicle to probationer subject to this article prohibited.

(a) No person shall knowingly rent, lease, or lend a motor vehicle to a person known to have had his or her driving privilege restricted as provided in this article, unless the vehicle is equipped with a functioning, certified ignition interlock device. Any person whose driving privilege is restricted as provided in this article shall notify any other person who rents, leases, or loans a motor vehicle to him or her of such driving restriction.

(b) Any person convicted of a violation of subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-8-113, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2012, p. 72, § 8/SB 236.)

The 2012 amendment, effective January 1, 2013, in subsection (a), twice deleted “as a condition of probation” following “restricted” in the first and second sentences.

42-8-114. Specifying provider for ignition interlock device.

(a) No judicial officer, probation officer, law enforcement officer, or other officer or employee of a court; person who owns, operates, or is employed by a private company which has contracted to provide private probation services for misdemeanor cases; or professional bondsman or agent or employee thereof shall specify, directly or indirectly, a particular provider center which the person may or shall utilize when use of an ignition interlock device is required. This subsection shall not prohibit any judicial officer, probation officer, law enforcement officer, or other officer or employee of a court; owner, operator, or employee of a private company which has contracted to provide probation services for misdemeanor cases; or professional bondsman or agent or employee thereof from furnishing any person, upon request, the names of certified provider centers.

(b) No person who owns, operates, or is employed by a private company which has contracted to provide probation services for misdemeanor cases or professional bondsman or agent or employee thereof shall be authorized to own, operate, or be employed by a provider center. (Code 1981, § 42-8-114, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6.)

42-8-115. Certification of ignition interlock devices.

(a) The commissioner of driver services or the commissioner's designee shall certify ignition interlock devices required by this article and the providers of such devices and shall promulgate rules and regulations for the certification of said devices and providers. The standards for certification of such devices shall include, but not be limited to, those standards for such devices promulgated by the National Highway Traffic Safety Administration and adopted by rule or regulation of the Department of Driver Services.

(b) The commissioner of driver services may utilize information from an independent agency to certify ignition interlock devices on or off the premises of the manufacturer in accordance with rules and regulations promulgated pursuant to this article. The cost of certification shall be borne by the manufacturers of ignition interlock devices.

(c) The commissioner of driver services shall adopt rules and regulations for determining the accuracy of and proper use of the ignition interlock devices in full compliance with this article. No model of ignition interlock device shall be certified unless it meets the accuracy

requirements specified by such rules and regulations. (Code 1981, § 42-8-115, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2005, p. 334, § 24-6/HB 501.)

42-8-116. Warning labels.

The providers certified by the Department of Driver Services shall design and adopt pursuant to regulations of the department a warning label which shall be affixed to each ignition interlock device upon installation. The label shall contain a warning that any person tampering, circumventing, or otherwise misusing the device is guilty of a misdemeanor and may be subject to civil liability. (Code 1981, § 42-8-116, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2005, p. 334, § 24-7/HB 501.)

42-8-116.1. Effect of failing to comply; previously installed devices.

Any other or former provision of this article notwithstanding:

(1) The failure to install an ignition interlock device pursuant to an order of probation granted on or after May 1, 1999, but prior to May 1, 2000, shall not be ground for suspension or revocation of driving privileges, revocation of probation, refusal to issue a probationary driver's license, or refusal to reinstate a driver's license for the person granted such probation unless the order granting such probation unequivocally conditioned probation upon the installation of an ignition interlock device; and

(2) In the case of any person who had installed and maintained an ignition interlock device in a motor vehicle for a period of six months pursuant to any order of probation granted on or after May 1, 1999, but prior to May 1, 2000, any lack of certification of such ignition interlock device or of the provider center for such device or lack of a limited driving permit for the period of use of such device shall not be ground for suspension or revocation of driving privileges, revocation of probation, refusal to issue a probationary driver's license, or refusal to reinstate a driver's license for the person subject to such order if such installation and the monitoring required by this article for the required period of maintenance is confirmed in writing by the provider center for such device. (Code 1981, § 42-8-116.1, enacted by Ga. L. 2000, p. 1457, § 6; Ga. L. 2001, p. 4, § 42.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000 and in 2001, "May 1, 2000" was substituted for "the effective date of this Code section" in paragraphs (1) and (2).

42-8-117. Revocation of driving privilege upon violation of probation imposed by Code Section 42-8-111.

(a)(1) In the event the sentencing court revokes a person's probation after finding that such person has violated the terms of the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued pursuant to subsection (a) of Code Section 42-8-111, the Department of Driver Services shall revoke that person's driving privilege for one year from the date the court revokes that person's probation. The court shall report such probation revocation to the Department of Driver Services by court order.

(2) This subsection shall not apply to any person whose limited driving permit has been revoked under subsection (d) of Code Section 42-8-112.

(b) In the event the sentencing court revokes a person's probation after finding that such person has twice violated the terms of the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued pursuant to subsection (a) of Code Section 42-8-111 during the same period of probation, the Department of Driver Services shall revoke that person's driving privilege for five years from the date the court revokes that person's probation for a second time. The court shall report such probation revocation to the Department of Driver Services by court order. (Code 1981, § 42-8-117, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2004, p. 604, § 2; Ga. L. 2005, p. 334, § 24-8/HB 501; Ga. L. 2012, p. 72, § 9/SB 236.)

The 2012 amendment, effective January 1, 2013, in the first sentence of paragraph (a)(1) and the first sentence of subsection (b), substituted "revokes a person's probation after finding that such person"

for "finds that a person" and substituted "the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued" for "probation imposed".

42-8-118. Requesting or soliciting another to blow into device; tampering with or circumventing operation of device.

(a) It is unlawful for any person whose driving privilege is restricted pursuant to subsection (a) of Code Section 42-8-111 to request or solicit any other person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing the person so restricted with an operable motor vehicle.

(b) It is unlawful for any person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing an operable motor vehicle to a person whose driving privilege is restricted pursuant to subsection (a) of Code Section 42-8-111.

(c) It is unlawful to tamper with, or circumvent the operation of, an ignition interlock device.

(d) Any person violating any provision of this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-8-118, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6.)

ARTICLE 8

DIVERSION CENTER AND PROGRAM

42-8-130. Establishment; obligations of respondent; confinement; fee; alternative methods of incarceration.

A county shall be authorized to establish a diversion center under the direction of the sheriff of the county in which the diversion center is located and a diversion program for the confinement of certain persons who have been found in contempt of court for violation of orders granting temporary or permanent alimony or child support and sentenced pursuant to subsection (c) of Code Section 15-1-4. While in such diversion program, the respondent shall be authorized to travel to and from his or her place of employment and to continue his or her occupation. The official in charge of the diversion program or his or her designee shall prescribe the routes, manner of travel, and periods of travel to be used by the respondent in attending to his or her occupation. If the respondent's occupation requires the respondent to travel away from his or her place of employment, the amount and conditions of such travel shall be approved by the official in charge of the diversion center or his or her designee. When the respondent is not traveling to or from his or her place of employment or engaging in his or her occupation, such person shall be confined in the diversion center during the term of the sentence. With the approval of the sheriff or his or her designee, the respondent may participate in educational or counseling programs offered at the diversion center. While participating in the diversion program, the respondent shall be liable for alimony or child support as previously ordered, including arrears, and his or her income shall be subject to the provisions of Code Sections 19-6-30 through 19-6-33 and Chapter 11 of Title 19. In addition, should any funds remain after payment of child support or alimony, the respondent may be charged and a fee payable to the county operating the diversion program to cover the costs of his or her incarceration and the administration of the diversion program which fee shall be not more than \$30.00 per day or the actual per diem cost of maintaining the respondent, whichever is less, for the entire period of time the person is confined to the center and participating in the program. If the respondent fails to comply with any of the requirements imposed upon him or her in accordance with this Code section, nothing shall prevent the

sentencing judge from revoking said assignment to a diversion program and providing for alternative methods of incarceration. (Code 1981, § 42-8-130, enacted by Ga. L. 1996, p. 649, § 3.)

JUDICIAL DECISIONS

Revocation of work release proper. — In light of a father's failure to comply with the requirements of O.C.G.A. § 42-8-130, the statute authorized the trial court to revoke the father's work release status; the father brought paperwork to the office of a superior court judge during the hours that the father was sup-

posed to be at work, and pursuant to § 42-8-130, the father was not authorized to be anywhere else besides the detention center, the father's place of employment, or traveling to and from the father's place of employment. *Cross v. Ivester*, 315 Ga. App. 760, 728 S.E.2d 299 (2012).

ARTICLE 9

PROBATION MANAGEMENT

Editor's notes. — The former article also pertained to probation management and was repealed on its own terms, effective June 30, 2008. The former article consisted of Code Sections 42-8-150

through 42-8-160 and was based on Code 1981, §§ 42-8-150 through 42-8-160, enacted by Ga. L. 2004, p. 775, § 7; Ga. L. 2005, p. 60, § 42/HB 95; Ga. L. 2006, p. 425, § 2/HB 692.

42-8-150. Short title.

This article shall be known and may be cited as the "Probation Management Act." (Code 1981, § 42-8-150, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-151. Definitions.

For purposes of this article, the term:

- (1) "Chief probation officer" means the highest ranking field probation officer in each judicial circuit.
- (2) "Commissioner" means the commissioner of corrections.
- (3) "Department" means the Department of Corrections.
- (4) "Electronic monitoring" means supervising, mapping, or tracking the location of a probationer by means including electronic surveillance, voice recognition, facial recognition, fingerprinting or biometric scan, automated kiosk, automobile ignition interlock device, or global positioning systems which may coordinate data with crime scene information.
- (5) "Hearing officer" means an impartial department employee or representative who has been selected and appointed to hear alleged

cases regarding violations of probation for administrative sanctioning.

(6) “Initial sanction” means the sanction set by the judge upon initial sentencing.

(7) “Intensive probation” means a level of probation supervision which includes, but is not limited to, curfews, community service, drug testing, program participation, special conditions of probation, and general conditions of probation as set forth in Code Section 42-8-35.

(8) “Options system day reporting center” means a state facility providing supervision of probationers which includes, but is not limited to, mandatory reporting, program participation, drug testing, community service, all special conditions of probation, and general conditions of probation as set forth in Code Section 42-8-35.

(9) “Options system probationer” means a probationer who has been sentenced to the sentencing options system.

(10) “Probation supervision” means a level of probation supervision which includes, but is not limited to, general conditions of probation as set forth in Code Section 42-8-35 and all special conditions of probation.

(11) “Residential substance abuse treatment facility” means a state correctional facility that provides inpatient treatment for alcohol and drug abuse.

(12) “Sentencing options system” means a continuum of sanctions for probationers that includes the sanctions set forth in subsection (c) of Code Section 42-8-153. (Code 1981, § 42-8-151, enacted by Ga. L. 2009, p. 32, § 1/SB 24; Ga. L. 2010, p. 878, § 42/HB 1387.)

42-8-152. Sentencing options systems; retention of jurisdiction by court.

(a) In addition to any other terms or conditions of probation provided for under this chapter, the trial judge may require that defendants who are sentenced to probation pursuant to subsection (c) of Code Section 42-8-34 be ordered to the sentencing options system.

(b) Where a defendant has been ordered to the sentencing options system, the court shall retain jurisdiction throughout the period of the probated sentence as provided in subsection (g) of Code Section 42-8-34, and may modify or revoke any part of a probated sentence as provided in Code Section 42-8-34.1 and subsection (c) of Code Section 42-8-38. (Code 1981, § 42-8-152, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-153. System of administrative sanctions.

(a) The department is authorized to establish by rules and regulations a system of administrative sanctions as an alternative to judicial modifications or revocations for probationers who violate the terms and conditions of the sentencing options system established under this article. The department may not, however, sanction probationers for violations of special conditions of probation or general conditions of probation for which the sentencing judge has expressed an intention that such violations be heard by the court pursuant to Code Section 42-8-34.1.

(b) The department shall only impose restrictions which are equal to or less restrictive than the sanction cap set by the sentencing judge.

(c) The administrative sanctions which may be imposed by the department are as follows, from most restrictive to least restrictive:

- (1) Probation detention center or residential substance abuse treatment facility;
- (2) Probation boot camp;
- (3) Department of Corrections day reporting center;
- (4) Intensive probation;
- (5) Electronic monitoring;
- (6) Community service; or
- (7) Probation supervision.

(d) The department may order offenders sanctioned pursuant to paragraphs (1) through (3) of subsection (c) of this Code section to be held in the local jail until transported to a designated facility. (Code 1981, § 42-8-153, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-154. Preliminary hearing for alleged violation of probation; exceptions to hearing requirement.

(a) Whenever an options system probationer is arrested on a warrant for an alleged violation of probation, an informal preliminary hearing shall be held within a reasonable time not to exceed 15 days.

(b) A preliminary hearing shall not be required when:

- (1) The probationer is not under arrest on a warrant;
- (2) The probationer signed a waiver of a preliminary hearing; or
- (3) The administrative hearing referred to in Code Section 42-8-155 will be held within 15 days of arrest. (Code 1981, § 42-8-154, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-155. Penalty for probation violation; hearing; waiver of hearing.

(a) If an options system probationer violates the conditions of probation, the department may impose administrative sanctions as an alternative to judicial modification or revocation of probation.

(b) Upon issuance of a petition outlining the alleged probation violations, the chief probation officer, or his or her designee, may conduct a hearing to determine whether an options system probationer has violated a condition of probation. If the chief probation officer determines that the probationer has violated a condition of probation, the chief probation officer is authorized to impose sanctions consistent with paragraphs (4) through (7) of subsection (c) of Code Section 42-8-153. The failure of an options system probationer to comply with a sanction imposed by the chief probation officer shall constitute a violation of probation.

(c)(1) Upon issuance of a petition outlining the alleged probation violations, the hearing officer may initiate an administrative proceeding to determine whether an options system probationer has violated a condition of probation. If the hearing officer determines by a preponderance of the evidence that the probationer has violated a condition of probation, the hearing officer may impose sanctions consistent with Code Section 42-8-153.

(2) The administrative proceeding provided for under this subsection shall be commenced within 15 days, but not less than 48 hours after notice of the administrative proceeding has been served on the probationer. The administrative proceeding may be conducted electronically.

(d) The failure of a probationer to comply with the sanction or sanctions imposed by the chief probation officer or hearing officer shall constitute a violation of probation.

(e) An options system probationer may at any time waive a hearing and voluntarily accept the sanctions proposed by the department. (Code 1981, § 42-8-155, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-156. Finality of hearing officer's decision; review.

(a) The hearing officer's decision shall be final unless the options system probationer files a request for review with the senior hearing officer. A request for review must be filed within 15 days of the issuance of the department's decision. Such request shall not stay the department's decision. The senior hearing officer shall issue a response within seven days of receipt of the review request.

(b) The senior hearing officer's decision shall be final unless the options system probationer files an appeal in the sentencing court. Such appeal shall name the commissioner as defendant and shall be filed within 30 days of the issuance of the decision by the senior hearing officer.

(c) This appeal shall first be reviewed by the judge upon the record. At the judge's discretion, a de novo hearing may be held on the decision. The filing of the appeal shall not stay the department's decision.

(d) Where the sentencing judge does not act on the appeal within 30 days of the date of the filing of the appeal, the department's decision shall be affirmed by operation of law. (Code 1981, § 42-8-156, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-157. Article not construed as repealing any court's probationary or supervisory power.

Nothing contained in this article shall be construed as repealing any power given to any court of this state to place offenders on probation or to supervise offenders. (Code 1981, § 42-8-157, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-158. Applicability of article.

This article shall only apply in judicial circuits where the department has allocated certified hearing officers. (Code 1981, § 42-8-158, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-159. Construction of article.

This article shall be liberally construed so that its purposes may be achieved. (Code 1981, § 42-8-159, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

CHAPTER 9

PARDONS AND PAROLES

Article 1

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ARTICLE 1

GENERAL PROVISIONS

42-9-1. Declaration of legislative policy.

In recognition of the doctrine contained in the Constitution of this state requiring the three branches of government to be separate, it is declared to be the policy of the General Assembly that the duties, powers, and functions of the State Board of Pardons and Paroles are executive in character and that, in the performance of its duties under this chapter, no other body is authorized to usurp or substitute its

functions for the functions imposed by this chapter upon the board. (Ga. L. 1953, Nov.-Dec. Sess., p. 210, § 2; Ga. L. 1985, p. 149, § 42.)

Cross references. — Composition and powers of State Board of Pardons and Paroles, Ga. Const. 1983, Art. IV, Sec. II, Paras. I, II.

JUDICIAL DECISIONS

Jurisdiction. — When no grounds existed which required the correction of an inmate’s sentence, neither the trial court nor the appellate court had jurisdiction to grant the request under O.C.G.A. § 42-9-1. *Harper v. State*, 262 Ga. App. 136, 586 S.E.2d 336 (2003).

Parole conditions. — Trial court erred by requiring the defendant to waive the defendant’s Fourth Amendment right as a condition of parole since “any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of defendant by the State Board of Pardons and Parole would be a nullity and constitute an exercise of power granted exclusively to the Executive.” *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

OPINIONS OF THE ATTORNEY GENERAL

Suspension of sentence upon prisoner’s parole by another state. — When a prisoner is incarcerated in another state and is serving that state and this state’s sentences concurrently, a provision for suspension of this state’s sentence in the event of parole by the other state authorities does not usurp functions of the State Board of Pardons and Paroles. 1974 Op. Att’y Gen. No. 74-147.

RESEARCH REFERENCES

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, §§ 15-18.

42-9-2. Creation of board.

Pursuant to Article IV, Section II, Paragraph I of the Georgia Constitution, there shall be a State Board of Pardons and Paroles, which shall consist of five members appointed by the Governor, subject to confirmation of the Senate. (Ga. L. 1943, p. 185, § 1; Ga. L. 1972, p. 1069, § 12; Ga. L. 1973, p. 157, § 1; Ga. L. 1983, p. 500, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1999, p. 867, § 1.)

Editor’s notes. — Ga. L. 1983, p. 500, § 1, not codified by the General Assembly, provides as follows: “It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia.”

JUDICIAL DECISIONS

Qualifications of members. — Ga. Const. 1945, Art. V, Sec. I, Para XI enumerating powers and duties of the board does not make provision for, or reference to, qualifications of members of the board at the time of their appointment. The qualifications of members of the board would, therefore, be controlled by the gen-

eral provisions of the Constitution and statutory laws limiting the rights of citizens to hold public office. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949).

Presumption of compliance with law. — While board may change the board's rules, there is presumption of law that members, being public officers, will discharge the members' duties and follow the statutory provisions which created the board. *Thompson v. State*, 203 Ga. 416, 47 S.E.2d 54 (1948).

Forfeiture of office. — There is nothing in the statutory provisions, defining powers and duties of members of State Board of Pardons and Paroles, which provides that doing certain acts by a member would operate as a forfeiture of the member's office. *Turner v. Wilburn*, 206 Ga.

149, 56 S.E.2d 285 (1949). (But see O.C.G.A. §§ 42-9-12 and 42-9-13 for provisions regarding incapacity, etc.).

There being no statutory provision that a member of the State Board of Pardons and Paroles should forfeit the member's office if the member engaged in any other business or profession, or held any public office, during the member's service upon the board, quo warranto is not the proper remedy to determine whether or not there has been an act of forfeiture. *Turner v. Wilburn*, 206 Ga. 149, 56 S.E.2d 285 (1949). (But see O.C.G.A. §§ 42-9-12 and 42-9-13 for provisions regarding incapacity, etc.).

Cited in *Todd v. State*, 75 Ga. App. 711, 44 S.E.2d 275 (1947); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Control in board, not individuals.

— Management and control is vested in State Board of Pardons and Paroles and not in individual members, or in any one individual officer. In the absence of a statutory provision to the contrary, when official authority is conferred upon the board or commission composed of three or more persons, such authority may be exercised by a majority of the members of the board, but it may not be exercised by a single member of such a board, or by a minority. 1945-47 Op. Att'y Gen. p. 450.

Function of chair of board. — Chair of the board is the proper parliamentary officer to preside at meetings of the board for the purpose of directing or regulating proceedings and seeing that meetings or hearings are conducted in an orderly manner. The chair of the board, however, by virtue of such office or of the chair's title, does not acquire authority to perform the powers and duties vested by the General

Assembly in the State Board of Pardons and Paroles. 1945-47 Op. Att'y Gen. p. 450.

Board's quasi-judicial functions retained. — Except for supervision of parolees and assignment to the Department of Offender Rehabilitation (Corrections) for administrative purposes only, the State Board of Pardons and Paroles retains the board's quasi-judicial functions and powers as a result of the Executive Reorganization Act of 1972 (Ga. L. 1972, p. 1015). 1975 Op. Att'y Gen. No. 75-72.

Assignment of staff by Department of Offender Rehabilitation (Corrections) to board. — Since the State Board of Pardons and Paroles has statutory authority to hire the board's own personnel to assist in carrying out the board's quasi-judicial functions, the Department of Offender Rehabilitation (Corrections) is not authorized to assign staff to the board as parole investigators. 1975 Op. Att'y Gen. No. 75-35.

RESEARCH REFERENCES

ALR. — Statute conferring power upon administrative body in respect to the parole of prisoners, or the discharge of pa-

rolees, as unconstitutional infringement of power of executive or judiciary, 143 ALR 1486.

42-9-3. "Board" defined.

As used in this chapter, the term "board" means the State Board of Pardons and Paroles.

JUDICIAL DECISIONS

Cited in *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

42-9-4. Appointments to board when Senate not in session.

Appointments made at times when the Senate is not in session shall be effective ad interim. (Ga. L. 1973, p. 157, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, §§ 135, 137.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 110-119.

42-9-5. Compensation of board members.

The members of the board shall devote their full time to the duties of their office. Beginning July 1, 1999, the salaries of the members of the board shall be set by the Governor and their travel expenses and costs of lodging and meals shall be paid as provided in Code Section 45-7-20. (Ga. L. 1943, p. 185, § 3; Ga. L. 1947, p. 673, § 2; Ga. L. 1952, p. 6, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 1999, p. 910, § 3; Ga. L. 1999, p. 1213, § 4.)

JUDICIAL DECISIONS

Engaging in another profession. — This section does not include any qualification of membership or any penalty by

forfeiture of office for engaging in another business or profession. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

OPINIONS OF THE ATTORNEY GENERAL

Per diem defined. — Words "per diem" are commonly used to cover an allowance for expenses of officials or agents while they are upon official or proper business away from their regular headquarters or base. 1948-49 Op. Att'y Gen. p. 415.

Purpose of the General Assembly in passing this article was to provide, in addition to the salary paid the board members, a subsistence allowance of a certain amount per month, plus transpor-

tation fare and per diem if travel is made by railroad or bus, or the regular mileage fee when a private car is used in the performance of official duties. Hence, the board members are entitled to receive the monthly subsistence plus transportation and per diem. 1948-49 Op. Att'y Gen. p. 415.

Members of State Board of Pardons and Paroles may receive subsistence payment each month and may receive expenses for lodging and meals incurred

while traveling upon official business.
1948-49 Op. Att'y Gen. p. 415.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, §§ 431 et seq., 448 et seq., 461. **C.J.S.** — 67 C.J.S., Officers and Public Employees, §§ 318, 322-326.

42-9-6. Board chairman.

(a) Each year the board shall elect one of its members to serve as chairman of the board for the ensuing year.

(b) The chairman shall draw no salary from the state in addition to that which he receives as a member of the board. (Ga. L. 1943, p. 185, § 4; Ga. L. 1983, p. 500, § 3; Ga. L. 1984, p. 689, § 1.)

Cross references. — Manner of selection of chairman of board, Ga. Const. 1983, Art. IV, Sec. II, Para. I.

Editor's notes. — Ga. L. 1983, p. 500, § 1, not codified by the General Assembly,

provides as follows: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

JUDICIAL DECISIONS

Liability for invidious discrimination. — Doctrine of qualified immunity does not shield defendants, Chair of the Board of Pardons and Paroles and Parole Decisions Guidelines employee, from liability for the plaintiff's equal protection claim. When making a parole decision,

members of a parole board may not engage in invidious discrimination based on race, religion, national origin, poverty, or some other constitutionally protected interest. *Parisie v. Morris*, 873 F. Supp. 1560 (N.D. Ga. 1995).

OPINIONS OF THE ATTORNEY GENERAL

Purpose and function of chair of board. — Creation of a chair position for the State Board of Pardons and Paroles was for the convenience of the board, in that the board is privileged to expect and to call upon such member for the performance of duties or services not calling for

the action of the board or delegated by the General Assembly to others; the board has the right to determine such duties and to provide how, and in what manner, the particular administrative acts shall be performed. 1945-47 Op. Att'y Gen. p. 450.

42-9-7. Board quorum.

A majority of the board shall constitute a quorum for the transaction of all business except as otherwise provided in this chapter. (Ga. L. 1943, p. 185, § 6.)

OPINIONS OF THE ATTORNEY GENERAL

Quorum of two members of the State Board of Pardons and Paroles must be present in order to grant a reprieve to an inmate; further, the law pro-

vides that two members of the board must concur in order to grant an inmate a reprieve. 1972 Op. Att’y Gen. No. 72-6.

42-9-8. Official board seal.

The board shall adopt an official seal of which the courts shall take judicial notice. (Ga. L. 1943, p. 185, § 5.)

42-9-9. Board employees; retention of badges and weapons.

(a) The board may appoint such clerical, stenographic, supervisory, and expert assistants and may establish such qualifications for its employees as it deems necessary. In its discretion, the board may discharge such employees.

(b) A certified parole officer leaving the service of the board under honorable conditions who has accumulated 20 or more years of service with the board as a certified parole officer shall be entitled as part of such employee’s compensation to retain his or her board issued badge. A certified parole officer employed with the board who is killed in the line of duty shall be entitled to have his or her board issued badge given to a surviving family member. Where a certified parole officer leaves the service of the board due to a disability that arose in the line of duty and such disability prevents the parole officer from further serving as a peace officer, then such disabled parole officer shall be entitled to retain his or her board issued badge regardless of the officer’s number of years of service with the board.

(c) An employee leaving the service of the board under honorable conditions who has accumulated 20 or more years of service with the board as a certified officer shall be entitled as part of such employee’s compensation to retain his or her board issued weapon.

(d) The board is authorized to promulgate rules and regulations for the implementation of this Code section. (Ga. L. 1943, p. 185, § 9; Ga. L. 2008, p. 285, § 1/SB 502; Ga. L. 2013, p. 82, § 2/HB 482.)

The 2013 amendment, effective July 1, 2013, deleted the former last sentence of subsection (b), which read; “The board is authorized to promulgate rules and

regulations for the implementation of this subsection.”, and added subsections (c) and (d).

OPINIONS OF THE ATTORNEY GENERAL

Board may hire and discharge employees required in the performance of

the board’s quasi-judicial functions. 1975 Op. Att’y Gen. No. 75-35.

Assignment of staff by department to board not required. — Since the board has statutory authority to hire the board's own personnel to assist in carrying out the board's quasi-judicial functions,

the Department of Offender Rehabilitation (Corrections) is not authorized to assign staff to the board as parole investigators. 1975 Op. Att'y Gen. No. 75-35.

42-9-9.1. Assistance to law enforcement, correctional, or homeland security agencies; conferring powers of law enforcement officers by the board.

(a) In order to assist in the preservation of peace, order, and security, governmental officials from law enforcement, correctional, or homeland security agencies of federal, state, or local governments may request assistance from the board. For the purpose of providing the requested assistance, a majority of the members of the board may confer all powers of a law enforcement officer of this state, including, but not limited to, the power to make arrests for violations of any of the criminal laws of this state, upon any person who is employed by the board and who is otherwise certified as a peace officer under the provisions of Chapter 8 of Title 35.

(b) Before the board grants the powers of a law enforcement officer authorized in subsection (a) of this Code section, the board must find that extraordinary circumstances exist that necessitate additional law enforcement officers.

(c) The time period for the law enforcement officer powers authorized in subsection (a) of this Code section shall be specified when the powers are bestowed, not to exceed 30 days.

(d) While possessing the powers of a law enforcement officer authorized in subsection (a) of this Code section, the board employee shall be under the direction of the federal, state, or local government entity requesting assistance from the board. (Code 1981, § 42-9-9.1, enacted by Ga. L. 2005, p. 1219, § 1/HB 289.)

42-9-10. Legal adviser of board.

The Attorney General shall be the legal adviser of the board. (Ga. L. 1943, p. 185, § 7.)

42-9-11. Office quarters for board; supplies and equipment.

The board shall have office quarters in the state capital. Supplies, stationery, and equipment shall be provided for the board in the same manner as they are provided for other departments, boards, commissions, bureaus, or offices of the state. (Ga. L. 1943, p. 185, § 8.)

42-9-12. Appointment of replacement for incapacitated member; calling of appointing council by Governor; immunity of council from civil or criminal liability.

(a) Whenever the Governor has personal knowledge or receives information deemed by him to be reliable that any member of the board, by reason of illness or other providential cause, is unable to perform the duties of his office, he shall call a council to be composed of the president of the Medical Association of Georgia, the president of the State Bar of Georgia, and the commissioner of public health for the purpose of ascertaining whether or not any member of the board is in fact unable to perform the duties of his office. In the event the president of the Medical Association of Georgia is disqualified or unable for any cause to serve on the council, he shall appoint some other member of the Medical Association of Georgia, preferably an elected officer therein, to serve in his place and stead; and he shall notify the Governor of his appointee. In the event the president of the State Bar of Georgia is disqualified or unable for any cause to serve on the council, he shall appoint some other member of the State Bar of Georgia, preferably an elected officer therein, to serve in his place and stead; and he shall notify the Governor of his appointee. In the event the commissioner of public health is disqualified or unable for any cause to serve on the council, the chairman of the Board of Public Health, if he is a physician licensed to practice under Chapter 34 of Title 43, shall serve in place of the commissioner. If both the commissioner and the chairman are disqualified or unable for any cause to serve on the council, the chairman shall designate a member of the Board of Public Health who is a physician licensed to practice under Chapter 34 of Title 43 to serve on the council. The chairman shall notify the Governor of his appointee.

(b) The Governor shall inform the council, appointed pursuant to subsection (a) of this Code section, of the information which has caused him to believe that a member of the board is unable to perform the duties of his office. If the council or a majority thereof, after a full investigation and examination into the truth of such information, shall, in writing duly signed, find that a member is incapacitated to perform the duties of his office, the Governor shall execute an executive order relating such facts. The member shall thereupon be suspended from performing the duties of his office and the Governor shall appoint a person to perform the duties of such member of the board during his incapacity.

(c) The person appointed to perform the duties of a member of the board shall give bond with good security as required of other members of the board, shall be given the same oath of office as other members of the board, and shall be issued a commission as a member of the board, which shall be effective so long as the person performs the duties of a

member of the board. Upon giving the bond and taking the oath as required by this Code section, and upon being issued his commission as authorized in this Code section, the person shall be authorized to do everything, perform every act, and exercise every prerogative and discretion that any other member of the board might do, perform, or exercise under existing law.

(d) The person appointed to serve as a member of the board in the place and stead of an incapacitated member shall be subject to the confirmation of the Senate, if the Senate is in session at the time of his appointment or convenes in session prior to the expiration of his appointment. Any such appointment made at times when the Senate is not in session shall be effective ad interim.

(e) During the period of incapacity of a member of the board, the member shall be entitled to receive the compensation and such other benefits as may be provided by law or otherwise for members of the board.

(f) Notwithstanding any other law to the contrary, the appointee may be an elected official, appointed official, or employee of this state. The order appointing the person to serve in the place and stead of any incapacitated member shall include his compensation. The compensation to be received by such person shall not exceed the compensation received by other members of the board.

(g) No member of the council designated pursuant to this Code section shall be civilly or criminally liable for his actions and doings as a member of the council. This provision may be pleaded as an absolute defense in any civil or criminal proceedings relative thereto. (Code 1933, § 77-502.1, enacted by Ga. L. 1970, p. 729, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1989, p. 14, § 42; Ga. L. 2009, p. 453, §§ 1-5, 1-6/HB 228; Ga. L. 2011, p. 705, §§ 6-4, 6-5/HB 214.)

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Public Officers and Employees, § 289 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 110-119, 183-190.

42-9-13. Reinstatement of incapacitated member upon recovery.

(a) Whenever the Governor has personal knowledge or receives information deemed by him to be reliable that a member of the board who has been determined to be incapacitated to perform the duties of his office has overcome his incapacity, that his incapacity has been

removed, or that his incapacity has ceased, the Governor shall call the council that previously examined the member of the board who was found to be incapacitated to perform the duties of his office or shall call a council comprised of the persons set forth in Code Section 42-9-12. Whenever the council has knowledge or receives information deemed by the members to be reliable that the member of the board who has been determined to be incapacitated to perform the duties of his office has overcome his incapacity, that his incapacity has been removed, or that his incapacity has ceased, the members may call themselves into session for the purpose of ascertaining whether or not the member of the board is in fact able to resume the performance of the duties of his office.

(b) If the Governor calls the council, he shall inform the council of the information that has caused him to believe that the person is able to resume the performance of the duties of his office. If the council or a majority thereof, after full investigation and examination into the truth of the information furnished by the Governor or otherwise given to the council, shall, in writing duly signed, find that the incapacity of the member has ceased and that the member is capable of assuming the performance of the duties of his office, the Governor shall execute an executive order relating such facts. The member shall thereafter assume and perform the duties of his office and the term of the member of the board appointed to perform the duties of the previously incapacitated member shall terminate. (Code 1933, § 77-502.2, enacted by Ga. L. 1970, p. 729, § 1.)

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 191-197.

42-9-14. Removal of board members for cause.

(a) As used in this Code section, the term “committee” or “removal committee” means the Governor, Lieutenant Governor, and an appointee of the Governor who is not the Attorney General.

(b) The removal committee is authorized to promulgate rules and regulations pertaining to the removal for cause of members of the board.

(c) Rules and regulations promulgated by the committee may include, but are not restricted to, the procedures to be observed in removing members of the board for cause and determinations as to what conduct by a board member shall be cause for removal.

(d) The removal committee is not an agency within the meaning of paragraph (1) of Code Section 50-13-2, and Chapter 13 of Title 50, the

“Georgia Administrative Procedure Act,” shall not be applicable to the removal committee. (Ga. L. 1973, p. 727, §§ 1-4; Ga. L. 1983, p. 500, § 4; Ga. L. 1988, p. 426, § 1.)

Editor’s notes. — Ga. L. 1983, p. 500, § 1, not codified by the General Assembly, provides: “It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia.”

RESEARCH REFERENCES

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, §§ 161-170.

42-9-15. Conflicts of interest by members or employees of board.

(a) Except as provided in subsections (b) and (c) of this Code section, no member of the board or full-time employee thereof, during his or her service upon or under the board, shall engage in any other business or profession or hold any other public office which business, profession, or office conflicts with his or her official duties as a member of the board or as an employee thereof; nor shall he or she serve as a representative of any political party or any executive committee or other governing body thereof, or as an executive officer or employee of any political committee, organization, or association; nor shall he or she be engaged on the behalf of any candidate for public office in the solicitation of votes or otherwise become a candidate for public office, without resigning from the board or from employment by the board.

(b) Except as provided by subsection (c) of this Code section, an employee of the board shall not be required to resign from employment by the board if he or she becomes a candidate for a public office of a county, school district, or municipality which does not require full-time service or accepts appointment to such an office.

(c) An employee of the board shall be required to resign from employment by the board if he or she becomes a candidate for the General Assembly or becomes a candidate for or accepts appointment to a public office which requires full-time service. (Ga. L. 1943, p. 185, § 10; Ga. L. 1997, p. 556, § 1.)

JUDICIAL DECISIONS

Political party membership. — If being a member of the Democratic executive committee made the defendant the holder of an “office” at the time of the defendant’s appointment as a member of the State Board of Pardons and Paroles, the defendant would not thereby forfeit the defendant’s appointment as a member

of such board. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949).

Section does not provide any penalty for violation. — Statute does not declare that, if a member of the board shall serve as a representative of a political party, or engage in any other business or profession, the member shall thereby

forfeit the member's office. The General Assembly might have provided that a member of the Democratic executive committee could not be appointed as a member of the board, and might have declared a member of the committee to be ineligible for appointment on the board. The legislature did not do this. The legislature provided that a member of the board should not serve as an executive officer or employee of any political committee. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949); *McLendon v. Wilburn*, 206 Ga. 646, 58 S.E.2d 423 (1950).

Engaging in another profession. — This section does not include any qualification of membership or any penalty by forfeiture of office for engaging in another business or profession. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Termination not constitutional violation. — Termination of plaintiff's posi-

tion as a parole review officer of the board of pardons and paroles after the plaintiff's election to county and state political party committees does not violate the plaintiff's constitutional rights of due process and equal protection or the plaintiff's constitutionally protected rights of political speech and association. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

No modification by O.C.G.A. § 45-10-70. — O.C.G.A. § 45-10-70 does not expressly or impliedly repeal O.C.G.A. § 42-9-15. It is reasonable for the General Assembly to loosen its limitations on political activity for state employees generally in the first provision, while continuing to prohibit pardon and parole board members and employees from engaging in political activity in the second provision. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

OPINIONS OF THE ATTORNEY GENERAL

No modification by § 45-10-70. — O.C.G.A. § 45-10-70 does not repeal, supersede, or otherwise modify O.C.G.A. § 45-9-15 as it applies to the political activities of a full-time employee of the State Board of Pardons and Paroles since § 45-10-70 only prohibits the promulgation of rules and regulations affecting an employee's ability to engage in certain political activity. 1987 Op. Att'y Gen. No. 87-16.

Violation as basis for disciplinary action under rules. — Violation of the Merit System rules governing political activity or violation of O.C.G.A. § 45-9-15 by a classified employee can be used as a valid basis for disciplinary action (including dismissal) or forfeiture of the position under the rules. 1987 Op. Att'y Gen. No. 87-16.

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, §§ 36, 37, 39, 40, 64 et seq., 68 et seq., 77.

42-9-16. Persons permitted to appear or practice before board for remuneration generally.

(a) Only duly licensed attorneys who are active members in good standing of the State Bar of Georgia shall be permitted to appear or practice in any matter before the board for a fee, money, or other remuneration.

(b) Any person who pays or receives any fee, money, or other remuneration in violation of subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1968, p. 1193, § 1.)

Law reviews. — For article discussing areas in which attorneys may represent clients before the State Board of Pardons and Paroles, see 13 Ga. St. B.J. 46 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Correspondence and telephone calls. — Any appearance or practice in a paid, representative capacity in any matter pending before the board is activity regulated by this section; this is so even if the activity involves contact limited to members of the board's staff. No exceptions or distinctions are made between particular activities undertaken in that capacity; correspondence and telephone calls are as much within the statute as are

personal appearances. 1974 Op. Att'y Gen. No. 74-22.

Disclosure of fee and profession. — Board may require a representative to disclose whether a fee is involved and whether the representative is an attorney; however, the board may not require disclosure of the amount of fee but may seek its voluntary disclosure. 1974 Op. Att'y Gen. No. 74-22.

42-9-17. Appearance before board by members of General Assembly or other elected or appointed officials on behalf of persons under the jurisdiction of the board.

(a) It shall be unlawful for members of the General Assembly or any other state elected or appointed official to accept any compensation for appearing before the board in behalf of a person under the jurisdiction of the board and for seeking a decision on behalf of the person. Nothing in this Code section shall be construed so as to prohibit:

(1) Members of the General Assembly or state elected or appointed officials from appearing before the board when their official duties require them to do so; or

(2) Members of the General Assembly or state elected or appointed officials from requesting information from and presenting information to the board on behalf of constituents when no compensation, gift, favor, or anything of value is accepted, either directly or indirectly, for such services.

(b) Nothing in subsection (a) of this Code section shall be construed to apply to the acceptance of compensation, expenses, and allowances received by members of the General Assembly or any other state elected or appointed official for their duties as such members or officials.

(c) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1974, p. 471, §§ 1-3.)

OPINIONS OF THE ATTORNEY GENERAL

Correspondence and telephone calls. — Any appearance or practice in a paid, representative capacity in any matter pending before the board is activity

regulated by this section; this is so even if the activity involves contact limited to members of the board's staff. No exceptions or distinctions are made between

particular activities undertaken in that capacity; correspondence and telephone calls are as much within the statute as are personal appearances. 1974 Op. Att'y Gen. No. 74-22.

Disclosure of fee and profession. — Board may require a representative to

disclose whether a fee is involved and whether the representative is an attorney; however, the board may not require disclosure of the amount of the fee but may seek its voluntary disclosure. 1974 Op. Att'y Gen. No. 74-22.

42-9-18. Maintenance of records of persons contacting members of board on behalf of inmates.

The board shall maintain a complete written record of every person contacting any member of the board on behalf of an inmate. The record shall be indexed and a copy of the record shall be placed in the inmate's file. The record shall include the name and address of the person contacting the board member and the reason for contacting the board member. (Ga. L. 1968, p. 1193, § 2.)

42-9-19. Annual report of board.

On or before January 1 of each year, the board shall make a written report of its activities, copies of which shall be sent to the Governor, the Attorney General, each body of the General Assembly, and to such other officers and persons as the board may deem advisable. One copy of the report shall become a part of the records of the board. (Ga. L. 1943, p. 185, § 24; Ga. L. 1983, p. 500, § 5; Ga. L. 1984, p. 22, § 42; Ga. L. 1984, p. 689, § 2.)

Editor's notes. — Ga. L. 1983, p. 500, § 1, not codified by the General Assembly, provides: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

42-9-20. General duties of board.

(a) In all cases in which the chairman of the board or any other member designated by the board has suspended the execution of a death sentence to enable the full board to consider and pass on same, it shall be mandatory that the board act within a period not exceeding 90 days from the date of the suspension order. In the cases which the board has power to consider, the board shall be charged with the duty of determining which inmates serving sentences imposed by a court of this state may be released on pardon or parole and fixing the time and conditions thereof. The board shall also be charged with the duty of supervising all persons placed on parole, of determining violations thereof and of taking action with reference thereto, of making such investigations as may be necessary, and of aiding parolees or probationers in securing employment. It shall be the duty of the board personally to study the cases of those inmates whom the board has

power to consider so as to determine their ultimate fitness for such relief as the board has power to grant. The board by an affirmative vote of a majority of its members shall have the power to commute a sentence of death to one of life imprisonment.

(b) The board shall provide The Council of Superior Court Clerks of Georgia the data set forth in Code Section 15-12-40.1, without charge and in the electronic format requested. (Ga. L. 1943, p. 185, § 11; Ga. L. 1973, p. 1294, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1983, p. 500, § 6; Ga. L. 2014, p. 451, § 14/HB 776.)

The 2014 amendment, effective July 1, 2014, designated the existing provisions as subsection (a) and added subsection (b).

Cross references. — Powers of State Board of Pardons and Paroles, Ga. Const. 1983, Art. IV, Sec. II, Para. II. Authority of Governor to suspend execution of death sentences, Ga. Const. 1983, Art. V, Sec. II,

Para. II and § 42-9-56. Imposition and review of death penalty generally, § 17-10-30 et seq.

Editor's notes. — Ga. L. 1983, p. 500, § 1, not codified by the General Assembly, provides: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

JUDICIAL DECISIONS

Constitutionality. — Presence of "unfettered discretion" in the clemency process does not render the imposition of the death penalty on the defendant arbitrary and capricious in violation of the Eighth Amendment. The discretion involved at the clemency stage can never cause the imposition of the death sentence; it serves only as an act of grace to relieve that sentence even when the sentence has been legally imposed. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983).

One application intended as matter of right. — It is the intent of the Constitution and this article that consideration and action upon one application for commutation by the board is all that the prisoner may demand as a matter of right. Whether or not a second application would be considered and acted upon by the board would be a matter for the board's discretion. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949).

Instructing jury of possibility of parole of prisoner not erroneous. — Defendant in a criminal case, upon conviction and after serving the defendant's minimum sentence, may be paroled to serve the remainder of the defendant's sentence outside the confines of the penitentiary and the court did not err in so

instructing the jury at their request. *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953).

Denial of parole, as distinguished from revocation of parole, does not amount to loss of liberty in the due process context. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979).

State supreme court vacated the trial court's judgment denying an inmate's petition for a writ of habeas corpus challenging procedures used by the Georgia State Board of Pardons and Paroles when the Board revoked the inmate's parole because the recommendation submitted by the Board member who heard the allegations was not a part of the record and there was no evidence in the record which allowed the court to determine the basis of absent Board members' decisions to accept that recommendation and what procedures were followed in revoking the inmate's parole. *Roberts v. Scroggy*, 278 Ga. 25, 597 S.E.2d 385 (2004).

Parole conditions. — Trial court erred by requiring the defendant to waive the defendant's Fourth Amendment right as a condition of parole since "any attempt by a court to impose its will over the Executive Department by attempting to

impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of defendant by the State Board of Pardons and Parole would be a nullity and constitute an exercise of power granted exclusively to the Executive." *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

Trial court did not err in denying parolee's petition for writ of mandamus to lift parole conditions requiring electronic monitoring and that the parolee get sex offender counseling as the electronic monitoring condition had been lifted by the time the trial court held a hearing on that

condition and the parole board did not act in an arbitrary, capricious, and unreasonable manner in imposing the counseling condition as the parolee's offenses, while they were not sexually violent offenses, had sexual overtones; thus, the parole board acted consistent with the board's primary goal of protecting society. *Massey v. Ga. Bd. of Pardons & Paroles*, 275 Ga. 127, 562 S.E.2d 172 (2002).

Cited in *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Release prior to serving maximum sentence. — If the prisoner is to be released any time prior to serving the prisoner's maximum sentence, that duty is one for the State Board of Pardons and Paroles. 1948-49 Op. Att'y Gen. p. 611.

Constitutional requirement in this section of a majority to decide action of board requires affirmative vote of three members to commute sentence of death to one of life imprisonment. 1973 Op. Att'y Gen. No. 73-137.

Confinement in prison system as prerequisite for parole. — In order to be eligible for parole consideration, a person must be confined in a state penal institution; a person out on bond would not be eligible for parole consideration unless and until one is returned to confinement in the state prison system. 1971 Op. Att'y Gen. No. 71-97.

Board does not have jurisdiction to act upon this state's sentence so long as the individual concerned is incarcerated in a federal prison serving this state's sentence concurrently with a federal sentence; to be eligible for parole consideration, an individual must be confined in a state penal institution. 1972 Op. Att'y Gen. No. 72-35.

Board may grant conditional release. — Under Ga. Const. 1983, Art. IV, Sec. II, Para. II, and this article, the board may, if the board deems it necessary and proper in the interest of the prisoner and the public, grant to such prisoner a condi-

tional release, providing that such release is conditioned upon the prisoner's remaining in a state hospital and continuing the treatment prescribed by the members of the staff until such time as the prisoner has been cured of an illness, or the illness reduced to such point where the physicians deem it prudent and safe for the prisoner and the general public that the prisoner be dismissed from the hospital. 1954-56 Op. Att'y Gen. p. 504.

Use of original record of trial. — Board may not review the original record of trial for purpose of determining guilt or innocence of the defendant, but may consider it on the question of clemency. 1945-47 Op. Att'y Gen. p. 443.

Sentence tolled upon grant of reprieve for receipt of medical treatment. — When a prisoner receives a reprieve of the prisoner's sentence for the purpose of receiving medical treatment, the prisoner's sentence does not run during the time the prisoner is outside the penitentiary. 1957 Op. Att'y Gen. p. 200.

Commuting sentence to present service. — Board does have power to commute a sentence of imprisonment to present service upon condition that the prisoner pay a fine in the sum fixed within the law by the board, or upon such other conditions which are not illegal, immoral, or impossible of performance. 1945-47 Op. Att'y Gen. p. 446.

Reprieve defined. — Reprieve is the withdrawing of any sentence for an inter-

val of time; it does no more than stay the execution of the sentence for a period of time. It is the withdrawing of a sentence for an interval of time whereby the execution of the sentence is suspended; it is merely the postponement of the sentence for a time; it does not and cannot defeat the ultimate execution of the judgment of the court but merely delays it; it is a respite, a temporary suspension of the execution of a sentence; it is a delay. 1957 Op. Att'y Gen. p. 200.

Advisement by attorney general as to whether conviction authorized. — Attorney General may not advise the board whether a conviction was authorized by the evidence submitted at trial. 1945-47 Op. Att'y Gen. p. 442.

Computation of parole eligibility. — It is proper to compute parole eligibility of one serving consecutive sentences under state and county control on the same basis as a single sentence equal in duration to the total time of the consecutive sentences. 1973 Op. Att'y Gen. No. 73-109.

Pardon for traffic offense. — Notwithstanding fact that an individual has been pardoned for a traffic offense, the individual is not entitled to have one's driver's license reinstated, because the right to operate a motor vehicle, to practice one's profession and other extraordinary rights granted and regulated by the state under the state's police power are not affected by pardon. 1954-56 Op. Att'y Gen. p. 506.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 1, 2, 6-12, 17, 20-22, 25-30, 32, 34, 44-47, 71, 73-76, 91.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 2-27, 45, 46.

ALR. — Judicial investigation of pardon by Governor, 30 ALR 238; 65 ALR 1471.

Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of the Governor, 32 ALR 1162.

Consent of convict as essential to a

pardon, commutation or reprieve, 52 ALR 835.

Statute conferring power upon administrative body in respect to the parole of prisoners, or the discharge of parolees, as unconstitutional infringement of power of executive or judiciary, 143 ALR 1486.

Offenses and convictions covered by pardon, 35 ALR2d 1261.

Pardon as restoring public office or license or eligibility therefor, 58 ALR3d 1191.

42-9-20.1. Public access to information regarding paroled felons residing within state.

Notwithstanding the provisions of Article 4 of Chapter 18 of Title 50 or any provisions of this chapter relating to the confidentiality of records, the State Board of Pardons and Paroles shall develop and implement a system whereby any interested citizen of this state shall be permitted to contact the board through an electronic calling system or by other means and receive information relating to persons who have been convicted of a felony, who have been paroled, and whose current addresses are within the State of Georgia. With respect to each parolee, the board shall provide the parolee's name, sex, date of birth, current address, crime or crimes for which the parolee was convicted, and the beginning and ending dates of such person's parole. The board shall not release any information regarding a person who has previously been paroled and whose civil rights have been restored. The board shall be authorized to charge a reasonable fee to cover the costs of providing

such information. The board shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section. (Code 1981, § 42-9-20.1, enacted by Ga. L. 1997, p. 915, § 1.)

42-9-21. Supervision of persons placed on parole or other conditional release; contracts for services and programs; collection of sums for restitution.

(a) The board shall have the function and responsibility of supervising all persons placed on parole or other conditional release by the board.

(b) The board is authorized to maintain and operate or to enter into memoranda of agreement or other written documents evidencing contracts with other state agencies, persons, or any other entities for transitional or intermediate or other services or for programs deemed by the board to be necessary for parolees or others conditionally released from imprisonment by order of the board and to require as a condition of relief that the offender pay directly to the provider a reasonable fee for said services or programs.

(c) In all cases where restitution is applicable, the board shall collect during the parole period those sums determined to be owed to the victim. (Ga. L. 1977, p. 1209, § 1; Ga. L. 1992, p. 3221, § 9; Ga. L. 1996, p. 1097, § 1; Ga. L. 1998, p. 1376, § 1.)

42-9-21.1. Compensation of board employee injured by inmate or parolee.

Repealed by Ga. L. 1986, p. 1491, § 3, effective July 1, 1986.

Editor's notes. — This Code section was based on Ga. L. 1985, p. 1113, § 2. For current provisions regarding compensation of board employees injured in the line of duty by an act of external violence, see Code Section 45-7-9.

42-9-22. Construction of chapter.

This chapter shall be liberally construed so that its purpose may be achieved. (Ga. L. 1943, p. 185, § 28.)

ARTICLE 2

GRANTS OF PARDONS, PAROLES, AND OTHER RELIEF

Cross references. — Authority of judge in fixing sentence to specify that offender may be considered for parole prior to completion of any minimum requirement otherwise imposed by law relating to completion of service of specified time before parole eligibility, § 17-10-1. Restrictions on granting of parole to person convicted of fourth felony offense, § 17-10-7.

Administrative rules and regulations. — Pardons and paroles, Official

Compilation of the Rules and Regulations Pardons and Paroles, Chapters 475-1
of the State of Georgia, State Board of through 475-3.

42-9-39. Restrictions on relief for person serving a second life sentence.

(a) The provisions of this Code section shall be binding upon the board in granting pardons and paroles, notwithstanding any other provisions of this article or any other law relating to the powers of the board.

(b) Except as otherwise provided in subsection (b) of Code Section 17-10-7, when a person is convicted of murder and sentenced to life imprisonment and such person has previously been incarcerated under a life sentence, such person shall serve at least 30 years in the penitentiary before being granted a pardon and before becoming eligible for parole.

(c) When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive 30 year periods for each such sentence, up to a maximum of 60 years, before being eligible for parole consideration.

(d) Any other provisions of this Code section to the contrary notwithstanding, the board shall have the authority to pardon any person convicted of a crime who is subsequently determined to be innocent of said crime. (Code 1981, § 42-9-39, enacted by Ga. L. 1983, p. 523, § 1; Ga. L. 1994, p. 1959, § 14; Ga. L. 2006, p. 379, § 27/HB 1059.)

Cross references. — Power and authority of the board to grant reprieves, pardons, paroles, and other relief, Ga. Const. 1983, Art. IV, Sec. II, Para. II.

Editor's notes. — Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles." That amendment was ratified by the voters on November 8, 1994, so this Code section, as set out above, became effective on January 1, 1995.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The

provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the

sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Ga. L. 2006, p. 379, § 30/HB 1059, not codified by the General Assembly, provides, in part, that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 159 (1994).

JUDICIAL DECISIONS

Construction with Georgia Street Gang and Terrorism Prevention Act.

— There is no legal authority to support the proposition that the Georgia Street Gang and Terrorism Prevention Act, O.C.G.A. § 16-15-1 et seq., and O.C.G.A. § 42-9-39, two very differently worded statutory provisions, are equivalent; thus, the defendant's argument that, as a matter of law, if the armed robbery of September 17, 1999, and the murder of December 28, 1999, are considered as part of the "pattern of criminal street gang activity" for purposes of violating the Street Gang Act, they must necessarily also be considered "offenses occurring in the same series of acts" within the meaning of § 42-9-39(c) failed. *Seabolt v. State*, 279 Ga. 518, 616 S.E.2d 448 (2005).

Denial of parole not necessarily

cruel and unusual punishment. —

Since in pleading guilty to four counts of murder and one count of aggravated assault, the defendant admitted a number of acts that a jury could reasonably consider "aggravating circumstances" under O.C.G.A. § 17-10-30(b), and in both Georgia and other jurisdictions, the defendant might well have been sentenced to death, a sentence denying the defendant consideration of parole for 30 years, under subsection (c) of O.C.G.A. § 42-9-39 does not constitute "cruel and unusual punishment." *McClendon v. State*, 256 Ga. 480, 350 S.E.2d 235 (1986).

Cited in *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843 (1986); *Davis v. State*, 255 Ga. 598, 340 S.E.2d 869 (1986); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986); *In re L.L.B.*, 256 Ga. 768, 353 S.E.2d 507 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 30, 76.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 18, 23-25, 46-53.

42-9-40. Parole guidelines system.

(a) The board shall adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system shall be consistent with the board's primary goal of protecting society and shall take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.

(b) The guidelines system required by subsection (a) of this Code section shall be adopted by rules or regulations of the board. The rules or regulations shall be adopted in conformity with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1980, p. 404, § 1.)

Law reviews. — For article critically analyzing the adoption of determinate-based sentencing, see 17 Ga. L. Rev. 425 (1983).

JUDICIAL DECISIONS

Release is not mandated. — O.C.G.A. § 42-9-42(c) must be read as a qualification of O.C.G.A. § 42-9-40, the provision requiring adoption of the parole guideline system. Although the legislature has required the Board of Pardon and Paroles to adopt a guideline system to be used as a framework for making more consistent parole decisions, it also preserved the Board's authority to use the Board's discretion in making final parole decisions. The statute and regulations, therefore, do not mandate that release be granted if the guidelines criteria is met. *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), cert. denied, 513 U.S. 1191, 115 S. Ct. 1254, 131 L. Ed. 2d 134 (1995).

Role of board in denying parole. — Plaintiff's contention that the Georgia Parole Board was not vested with the discretion to deny parole was specious in light of O.C.G.A. § 42-9-40. *Toenniges v. Ga. Dep't of Corr.*, No. 1:09-CV-165 (WLS),

2010 U.S. Dist. LEXIS 52907 (M.D. Ga. May 26, 2010).

Mandamus not available to compel change in parole date. — Setting of a tentative parole month was a discretionary act of the state parole board and mandamus did not lie to compel the board to reinstate a former tentative date. *Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275 (1996), cert. denied, 517 U.S. 1108, 116 S. Ct. 1329, 134 L. Ed. 2d 480 (1996).

Even though the State Pardons and Paroles Board was required to adopt a parole guideline system on all inmates who would become eligible for parole, except for inmates serving life sentences, the board was not obligated to grant parole to a prisoner at the earliest date parole had to be considered as the issue of whether to grant parole was a discretionary matter entrusted to the board; thus, the prisoner's petition for a writ of mandamus to compel parole at an earlier time

should have been denied. *Ray v. Carthen*, 663 S.E.2d 256 (2008); *Bradshaw v. State*, 275 Ga. 459, 569 S.E.2d 542 (2002). 284 Ga. 675, 671 S.E.2d 485 (2008).
Cited in *Terry v. Hamrick*, 284 Ga. 24,

RESEARCH REFERENCES

ALR. — Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes, 100 ALR3d 431.

42-9-41. Duty of board to obtain and place in records information respecting persons subject to relief or placed on probation; investigations; rules.

(a) It shall be the duty of the board to obtain and place in its permanent records information as complete as may be practicable on every person who may become subject to any relief which may be within the power of the board to grant. The information shall be obtained as soon as possible after imposition of the sentence and shall include:

- (1) A complete statement of the crime for which the person is sentenced, the circumstances of the crime, and the nature of the person's sentence;
- (2) The court in which the person was sentenced;
- (3) The term of his sentence;
- (4) The name of the presiding judge, the prosecuting officers, the investigating officers, and the attorney for the person convicted;
- (5) A copy of presentence investigation and any previous court record;
- (6) A fingerprint record;
- (7) A copy of all probation reports which may have been made; and
- (8) Any social, physical, mental, or criminal record of the person.

(b) The board in its discretion may also obtain and place in its permanent records similar information on each person who may be placed on probation. The board shall immediately examine such records and any other records obtained and make such other investigation as it may deem necessary. It shall be the duty of the court and of all probation officers and other appropriate officers to furnish to the board, upon its request, such information as may be in their possession or under their control. The Department of Behavioral Health and Developmental Disabilities and all other state, county, and city agencies, all sheriffs and their deputies, and all peace officers shall cooperate with the board and shall aid and assist it in the performance of its duties. The board may make such rules as to the privacy or privilege of such information and as to its use by persons other than the board and its

staff as may be deemed expedient in the performance of its duties. (Ga. L. 1943, p. 185, § 12; Ga. L. 2009, p. 453, § 3-2/HB 228.)

JUDICIAL DECISIONS

Right to parole. — Georgia parole statutes create no entitlement to or liberty interest in parole. *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir.), cert. denied, 459 U.S. 1043, 103 S. Ct. 462, 74 L. Ed. 2d 612 (1982).

Impact of parole officers and board's actions. — Parole board was responsible for maintaining a complete record on any person who came under the power of the board and that record included the nature and term of the individual's sentence; furthermore, it was the parole board that has the power to set the terms and conditions of parole. Thus, the acts of the parole officer, or those within the parole board who make such determinations, in setting the expiration dates of plaintiff's parole, served to break the

chain of causation with respect to any error that might have flowed from the misstatement in the parole officer's motion; the parole officer had no power to increase plaintiff's sentence and no power to set the terms of plaintiff's parole. *Morgan v. Yarbrough*, No. 7:07-cv-45 (HL), 2008 U.S. Dist. LEXIS 35269 (M.D. Ga. Apr. 30, 2008).

Examination of file by inmate. — Refusal of a parole board to allow an inmate to examine the inmate's file does not assume the proportions of a deprivation of the inmate's rights under the Constitution or the laws of the United States. *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir.), cert. denied, 459 U.S. 1043, 103 S. Ct. 462, 74 L. Ed. 2d 612 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Maintenance of misdemeanor records mandatory. — Misdemeanant may become subject to parole upon application; therefore, the board must main-

tain all information gathered on such an individual in the board's "permanent" records. 1963-65 Op. Att'y Gen. p. 318.

RESEARCH REFERENCES

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 6, 7.

42-9-42. Procedure for granting relief from sentence; conditions and prerequisites; violation of parole.

(a) No person shall be granted clemency, pardon, parole, or other relief from sentence except by a majority vote of the board. A majority of the members of the board may commute a death sentence to life imprisonment, as provided in Code Section 42-9-20.

(b) A grant of clemency, pardon, parole, or other relief from sentence shall be rendered only by a written decision which shall be signed by at least the number of board members required for the relief granted and which shall become a part of the permanent record.

(c) Good conduct, achievement of a fifth-grade level or higher on standardized reading tests, and efficient performance of duties by an

inmate shall be considered by the board in his favor and shall merit consideration of an application for pardon or parole. No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society. Furthermore, no person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge. However, notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons.

(d)(1) Any person who is paroled shall be released on such terms and conditions as the board shall prescribe. The board shall diligently see that no peonage is allowed in the guise of parole relationship or supervision. The parolee shall remain in the legal custody of the board until the expiration of the maximum term specified in his sentence or until he is pardoned by the board.

(2) The board may require the payment of a parole supervision fee of at least \$10.00 per month as a condition of parole or other conditional release. The monthly amount shall be set by rule of the board and shall be uniform state wide. The board may require or the parolee or person under conditional release may request that up to 24 months of the supervision fee be paid in advance of the time to be spent on parole or conditional release. In such cases, any advance payments are nonreimbursable in the event of parole or conditional release revocation or if parole or conditional release is otherwise terminated prior to the expiration of the sentence being served on parole or conditional release. Such fees shall be collected by the board to be paid into the general fund of the state treasury.

(e) If a parolee violates the terms of his parole, he shall be subject to rearrest or extradition for placement in the actual custody of the board, to be redelivered to any state or county correctional institution of this state. (Ga. L. 1943, p. 185, § 13; Ga. L. 1974, p. 474, § 1; Ga. L. 1975, p. 795, § 1; Ga. L. 1984, p. 775, § 1; Ga. L. 1985, p. 414, § 1; Ga. L. 1986, p. 1596, § 3.)

Cross references. — Power of board to order adult offender to make restitution to victim as condition of any relief ordered, § 17-14-3. Power of board to grant parole prior to completion of one-third of sentence if restitution to victim is ordered as condition of parole, § 17-14-4.

JUDICIAL DECISIONS

Section constitutional. — Presence of “unfettered discretion” in the clemency process does not render the imposition of the death penalty on the defendant arbi-

trary and capricious in violation of the Eighth Amendment. The discretion involved at the clemency stage can never cause the imposition of the death sentence; it serves only as an act of grace to relieve that sentence even when the sentence has been legally imposed. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983).

Instruction to jury. — Defendant in a criminal case, upon conviction and after serving the defendant's minimum sentence, may be paroled to serve the remainder of the defendant's sentence outside the confines of the penitentiary and the court did not err in so instructing the jury at their request. *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953).

State cannot be required to explain state's reasons for parole decision when it is not required to act on prescribed grounds. *Georgia State Bd. of Pardons & Paroles v. Turner*, 248 Ga. 767, 285 S.E.2d 731 (1982).

Board control until expiration of maximum term. — This section gives the board control over the prisoner until expiration of the prisoner's maximum term and power to revoke a parole and remand a parolee into custody to serve the maximum of the parolee's sentence. *Balkcom v. Sellers*, 219 Ga. 662, 135 S.E.2d 414 (1964).

No liberty interest in parole. — Current Georgia parole system, as reflected in O.C.G.A. § 42-9-42, does not require the board to grant parole based upon the presence or absence of specified findings and, as a result, does not give rise to a liberty interest. Accordingly, because the

plaintiff had no liberty interest in parole, the plaintiff's right to procedural due process could not have been violated and summary judgment on the plaintiff's claim was appropriate. *Greene v. Georgia Pardons & Parole Bd.*, 807 F. Supp. 748 (N.D. Ga. 1992).

Paragraph (c) of O.C.G.A. § 42-9-42 must be read as a qualification of O.C.G.A. § 42-9-40, the provision requiring adoption of the parole guideline system. Although the legislature has required the Board of Pardon and Paroles to adopt a guideline system to be used as a framework for making more consistent parole decisions, it also preserved the Board's authority to use the Board's discretion in making final parole decisions. The statute and regulations, therefore, do not mandate that release be granted if the guidelines criteria is met. *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), cert. denied, 513 U.S. 1191, 115 S. Ct. 1254, 131 L. Ed. 2d 134 (1995).

Cited in *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Balkcom v. Jackson*, 219 Ga. 59, 131 S.E.2d 551 (1963); *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Houser v. Morris*, 518 F. Supp. 873 (N.D. Ga. 1981); *Shafer v. Crockett*, 160 Ga. App. 419, 287 S.E.2d 358 (1981); *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982); *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007); *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008); *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

OPINIONS OF THE ATTORNEY GENERAL

Jurisdiction of state probation system. — Defendant may come under jurisdiction of the state probation system in only one of two ways: (1) when the court elects to place the defendant in the custody of the state probation system; or (2) when the board elects to release a prisoner on "probation." 1972 Op. Att'y Gen. No. 72-21.

Adult and youthful offenders treated alike. — Rules and regulations of the board do not distinguish between youthful and adult offenders in setting

forth those circumstances and criteria which determine when offenders will be considered for parole. Those offenders who were sentenced in the superior court, but committed to the Division for Children and Youth until their seventeenth birthday, are to be treated as all other offenders sentenced in the superior court on felony charges, for purposes of parole consideration. 1980 Op. Att'y Gen. No. 80-142.

Parolee remains under supervision of prison authorities. — O.C.G.A.

§§ 42-9-42 and 42-9-52, construed together, mean that a paroled prisoner while serving a sentence outside the confines of the prison continues to serve the sentence under supervision of prison authorities. 1945-47 Op. Att'y Gen. p. 441.

Reimbursement for medical care provided to parolees. — Person to whom a prisoner suffering from tuberculosis has been paroled should be reimbursed for providing proper medical care. 1945-47 Op. Att'y Gen. p. 441.

Authority to collect payments of fines and restitution. — Collection and disbursement of payments of fines and

restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Payment of fines and restitution during parole. — State Board of Pardons and Paroles may, as a condition of parole, order parolees to commence court imposed payments such as fines and restitution while on parole. 1984 Op. Att'y Gen. No. 84-50.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 78, 79, 82, 91, 94-96, 99.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 6, 7, 26, 46, 48, 52, 53, 59-62.

ALR. — Formal requisites of pardon, 34 ALR 212.

Constitutionality of statute prescribing course of conduct for discharged convict, 38 ALR 1036.

Consent of convict as essential to a pardon, commutation or reprieve, 52 ALR 835.

Conditional pardon, 60 ALR 1410.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 ALR 419.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed, 35 ALR2d 769.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon, 58 ALR3d 1156.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases, 26 ALR4th 455.

42-9-42.1. Use of HIV test results in granting relief from sentence; conditions.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) The board is authorized to obtain from any penal institution, with at least 60 days prior notice to that institution, and any such penal institution is authorized to provide the board with HIV test results regarding any person who applies or is eligible for clemency, a pardon, a parole, or other relief from a sentence or to require such person to submit to an HIV test and to consider the results of any such test in determining whether to grant clemency, a pardon, a parole, or other relief to such person. Test results obtained pursuant to the authority of this Code section may not be the sole basis for determining whether to grant or deny any such relief to such person, however. The board is further authorized to impose conditions upon any person to whom the

board grants clemency, a pardon, a parole, or other relief and who is determined by an HIV test to be infected with HIV, which conditions may include without being limited to those designed to prevent the spread of HIV by that person. (Code 1981, § 42-9-42.1, enacted by Ga. L. 1988, p. 1799, § 10.)

Cross references. — Child committing delinquent act constituting AIDS transmission crime including testing and reporting, § 15-11-603.

Editor's notes. — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the

fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection."

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 20, 77.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 26, 48, 53.

42-9-43. Information to be considered by board generally; conduct of investigation and examination; determination as to grant of relief; notice to victim.

(a) The board, in considering any case within its power, shall cause to be brought before it all pertinent information on the person in question. Included therein shall be:

(1) A report by the superintendent, warden, or jailer of the jail or state or county correctional institution in which the person has been confined upon the conduct of record of the person while in such jail or state or county correctional institution;

(2) The results of such physical and mental examinations as may have been made of the person;

(3) The extent to which the person appears to have responded to the efforts made to improve his or her social attitude;

(4) The industrial record of the person while confined, the nature of his or her occupations while so confined, and a recommendation as

to the kind of work he or she is best fitted to perform and at which he or she is most likely to succeed when and if he or she is released;

(5) The educational programs in which the person has participated and the level of education which the person has attained based on standardized reading tests; and

(6) The written, oral, audiotaped, or videotaped testimony of the victim, the victim's family, or a witness having personal knowledge of the victim's personal characteristics.

(b)(1) As used in this subsection, the term:

(A) "Debilitating terminal illness" means a disease that cannot be cured or adequately treated and that is reasonably expected to result in death within 12 months.

(B) "Entirely incapacitated" means an offender who:

(i) Requires assistance in order to perform two or more necessary daily life functions or who is completely immobile; and

(ii) Has such limited physical or mental ability, strength, or capacity that he or she poses an extremely low risk of physical threat to others or to the community.

(C) "Necessary daily life function" means eating, breathing, dressing, grooming, toileting, walking, or bathing.

(2) The board may issue a medical reprieve to an entirely incapacitated person suffering a progressively debilitating terminal illness in accordance with Article IV, Section II, Paragraph II of the Constitution.

(c) The board may also make such other investigation as it may deem necessary in order to be fully informed about the person.

(d) Before releasing any person on parole, the board may have the person appear before it and may personally examine him or her. Thereafter, upon consideration, the board shall make its findings and determine whether or not such person shall be granted a pardon, parole, or other relief within the power of the board; and the board shall determine the terms and conditions thereof. Notice of the determination shall be given to such person and to the correctional official having him or her in custody.

(e) If a person is granted a pardon or a parole, the correctional officials having the person in custody, upon notification thereof, shall inform him or her of the terms and conditions thereof and shall, in strict accordance therewith, release the person.

(f) The board shall send written notification of the parole decision to the victim or, if the victim is no longer living, to the family of the victim.

(Ga. L. 1943, p. 185, § 14; Ga. L. 1986, p. 1596, § 4; Ga. L. 2009, p. 192, § 2/SB 151; Ga. L. 2013, p. 222, § 19/HB 349.)

The 2013 amendment, effective July 1, 2013, added subsection (b); and redesignated former subsections (b) through (e) as present subsections (c) through (f), respectively. See editor's note for applicability.

Cross references. — Power of board to order adult offender to make restitution to victim as condition of any relief ordered, § 17-14-3. Power of board to grant parole prior to completion of one-third of sentence if restitution of victim is ordered as condition of parole, § 17-14-4. Crime Victims' Bill of Rights, T. 17, C. 17.

Editor's notes. — Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

This section allows, but does not require, an interview. *Williams v. McCall*, 531 F.2d 1247 (5th Cir. 1976).

Board members immune from damage suits. — Members of the board in passing on and processing applications for parole exercise discretion imposed upon the members by law. The members are immune from suits for damages for such governmental functions. *Neal v. McCall*, 134 Ga. App. 680, 215 S.E.2d 537 (1975).

No interview required. — Because a prior district court order only required that the inmate be considered for parole annually under the rules in effect at the time of the inmate's offense, and neither the order nor the rule in effect at the time of the inmate's offense required interviews, the members of Georgia's Board of Pardons and Paroles complied with the order; and, while the United States Court of Appeals for the Eleventh Circuit included interviews in the list of actions encompassed by "parole reconsideration hearing," the Eleventh Circuit did not hold that an in-person interview was mandated, and O.C.G.A. § 42-9-43(b), the statute cited by the Eleventh Circuit, did

not require such an interview. *Akins v. Perdue*, No. 1:05-CV-336-TWT, 2006 U.S. Dist. LEXIS 25942 (N.D. Ga. Apr. 18, 2006).

No power to increase sentence. — Parole board was responsible for maintaining a complete record on any person who came under the power of the board and that record included the nature and term of the individual's sentence; furthermore, it was the parole board that has the power to set the terms and conditions of parole. Thus, the acts of the parole officer, or those within the parole board who make such determinations, in setting the expiration dates of plaintiff's parole, served to break the chain of causation with respect to any error that might have flowed from the misstatement in the parole officer's motion; the parole officer had no power to increase the plaintiff's sentence and no power to set the terms of the plaintiff's parole. *Morgan v. Yarbrough*, No. 7:07-cv-45 (HL), 2008 U.S. Dist. LEXIS 35269 (M.D. Ga. Apr. 30, 2008).

Cited in *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982).

OPINIONS OF THE ATTORNEY GENERAL

Board may make investigations as deemed necessary so as to be fully in-

formed about persons seeking parole. 1973 Op. Att'y Gen. No. 73-22.

Access to hospital “discharge summaries.” — Board should be given access to “discharge summaries” from Central State Hospital on inmates being considered for parole; such disclosure would not be a breach of confidentiality. 1973 Op. Att’y Gen. No. 73-54.

Stipulation in order revoking con-

ditional pardon. — Board, in revoking a conditional pardon of a parolee who was convicted of burglary committed while on parole, may stipulate in the order of revocation that the balance of the original sentence be served consecutively with the new sentence. 1952-53 Op. Att’y Gen. p. 388.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 20, 77.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 48, 50-53.

ALR. — Consent of convict as essential to a pardon, commutation or reprieve, 52 ALR 835.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state fails to specify in that regard, 90 ALR3d 408.

42-9-43.1. Citizenship status of prisoner; deportation.

(a) In determining whether to grant parole the board shall be authorized to make inquiry into whether the prisoner is lawfully present in the United States under federal law.

(b) If the board determines that the prisoner is not lawfully present in the United States, the board shall be authorized to make inquiry into whether the prisoner would be legally subject to deportation from the United States while on parole.

(c) If the board determines that the prisoner would be legally subject to deportation from the United States while on parole, the board may:

(1) Consider the interest of the state in securing certain and complete execution of its judicial sentences in criminal cases;

(2) Consider the likelihood that deportation may intervene to frustrate that state interest if parole is granted; and

(3) Where appropriate, decline to grant parole in furtherance of the state interest in certain and complete execution of sentences.

(d) Any grant of parole to an alien prisoner, as such term is defined in Code Section 42-1-11.1, who is subject to deportation shall be conditioned upon the deportation of such prisoner pursuant to a final removal order and a further condition that such prisoner abide by the deportation order and all immigration laws of the United States. (Code 1981, § 42-9-43.1, enacted by Ga. L. 2007, p. 34, § 2/SB 23; Ga. L. 2010, p. 263, § 3/SB 136.)

Cross references. — Factoring into sentencing determinations citizenship status of convict, § 17-10-1.3.

Editor's notes. — Ga. L. 2007, p. 34, § 3/HB 23, not codified by the General Assembly, provides that: "The General Assembly finds that this Act states factors for consideration in discretionary decision-making processes within the criminal justice system. The General Assembly finds that such factors could have been considered prior to or without the enactment of this Act. Accordingly, it is the intention of the General Assembly that this Act may be applied with respect to offenses committed prior to its effective date as well as offenses committed on or after its effective date. However, if there should be a judicial determination that retrospective application is prohibited, it is the intention of the General Assembly that retrospective application should be severable." This Act became effective May 11, 2007.

Ga. L. 2010, p. 263, § 1/SB 136, not codified by the General Assembly, pro-

vides: "It is the intent of the General Assembly to ensure that alien prisoners subject to deportation are not released from prison into the Georgia community. It is further the intent of this legislative body to reduce the costs and expenses of operating state prisons by reducing the number of alien prisoners incarcerated in the Georgia penal system and to expedite the deportation process of such prisoners. Moreover, Georgia should support the re-arrest and revocation of parole of any alien prisoner who reenters the United States in violation of a release on a reprieve with a detainer to United States Immigration and Customs Enforcement. The General Assembly intends to require state agencies to take part in the Immigration and Customs Enforcement Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) Program funded and operated by the United States government and take all measures to fully cooperate and communicate with state, local, and federal agencies for the implementation of such program."

42-9-44. Specification of terms and conditions of parole; adoption of general and special rules; violation of parole; certain parolees to obtain high school diploma or general educational development (GED) diploma.

(a) The board, upon placing a person on parole, shall specify in writing the terms and conditions thereof. A certified copy of the conditions shall be given to the parolee. Thereafter, a copy shall be sent to the clerk of the court in which the person was convicted. The board shall adopt general rules concerning the terms and conditions of parole and concerning what shall constitute a violation thereof and shall make special rules to govern particular cases. The rules, both general and special, may include, among other things, a requirement that the parolee shall not leave this state or any definite area in this state without the consent of the board; that the parolee shall contribute to the support of his or her dependents to the best of the parolee's ability; that the parolee shall make reparation or restitution for his or her crime; that the parolee shall abandon evil associates and ways; and that the parolee shall carry out the instructions of his or her parole supervisor, and, in general, so comport himself or herself as the parolee's supervisor shall determine. A violation of the terms of parole may render the parolee liable to arrest and a return to a penal institution to serve out the term for which the parolee was sentenced.

(b) Each parolee who does not have a high school diploma or a general educational development equivalency diploma (GED) shall be required as a condition of parole to obtain a high school diploma or general educational development equivalency diploma (GED) or to pursue a trade at a vocational or technical school. Any such parolee who demonstrates to the satisfaction of the board an existing ability or skill which does in fact actually furnish the parolee a reliable, regular, and sufficient income shall not be subject to this provision. Any parolee who is determined by the Department of Corrections or the board to be incapable of completing such requirements shall only be required to attempt to improve their basic educational skills. Failure of any parolee subject to this requirement to attend the necessary schools or courses or to make reasonable progress toward fulfillment of such requirement shall be grounds for revocation of parole. The board shall establish regulations regarding reasonable progress as required by this subsection. This subsection shall apply to paroles granted on or after July 1, 1995. (Ga. L. 1943, p. 185, § 15; Ga. L. 1995, p. 625, § 2.)

Cross references. — Requirement of restitution by criminal offender as condition of relief generally, § 17-14-3. Granting by State Board of Pardons and Paroles of parole conditioned on restitution prior

to completion of one-third of sentence, § 17-14-4.

Law reviews. — For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 301 (1995).

JUDICIAL DECISIONS

Board control over prisoner. — When, after a prisoner has served the minimum term provided in a felony sentence, the board releases a prisoner under certain conditions and permits the prisoner to serve the remainder of the prisoner's maximum sentence outside of prison, and the prisoner violates the conditions imposed, the board may revoke the release and return the prisoner to the penitentiary to serve the remainder of the prisoner's maximum sentence. *Crider v. Balkcom*, 204 Ga. 480, 50 S.E.2d 321 (1948) (decided under former Code 1933, § 27-2502 (see § 17-10-1)).

Ga. L. 1943, p. 185, §§ 13 and 15 (see now O.C.G.A. §§ 42-9-42 and § 42-9-44) give the board control over the prisoner until expiration of the prisoner's maxi-

mum term and the power to revoke a parole and remand a parolee into custody to serve the maximum term of the parolee's sentence. *Balkcom v. Sellers*, 219 Ga. 662, 135 S.E.2d 414 (1964).

Habeas court erroneously addressed a defendant's challenge to a parole condition that banned the defendant from all counties in the State of Georgia but one as the habeas court's attempt to control the parole condition was a violation of the constitutional provision regarding the separation of powers since the Board of Pardons and Paroles had executive power regarding the terms and conditions of paroles. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Stipulation in order revoking conditional pardon. — Board, in revoking a conditional pardon of a parolee who was

convicted of burglary committed while on parole, may stipulate in the order of revocation that the balance of the original

sentence be served consecutively with the new sentence. 1952-53 Op. Att'y Gen. p. 388.

Authority to collect payments of fines and restitution. — Collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as

such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Payment of fines and restitution during parole. — State Board of Pardons and Paroles may, as a condition of parole, order parolees to commence court imposed payments such as fines and restitution while on parole. 1984 Op. Att'y Gen. No. 84-50.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 78, 79, 82, 91, 94-99.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 32, 58-61.

ALR. — Parole as suspending running of sentence, 28 ALR 947.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 ALR2d 1074.

Ability to pay as necessary consider-

ation in conditioning probation or suspended sentence upon reparation or restitution, 73 ALR3d 1240.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases, 26 ALR4th 455.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 ALR Fed. 619.

42-9-44.1 and 42-9-44.2.

Reserved. Repealed by Ga. L. 2006, p. 379, § 28/HB 1059, effective July 1, 2006.

Editor's notes. — These Code sections were based on Code 1981, §§ 42-9-44.1 and 42-9-44.2 enacted by Ga. L. 1994, p.

791, § 1; Ga. L. 1997, p. 1578, § 2; Ga. L. 2005, p. 60, § 42/HB 95.

42-9-44.3. Definitions; required community service; liability; work during periods of natural disaster.

(a) As used in this Code section, the term:

(1) "Agency employee" means an employee or agent of a community service agency, whether the individual is a paid or unpaid employee or agent.

(2) "Community service" means uncompensated work by an offender with a community service agency for the benefit of the community pursuant to a directive of the State Board of Pardons and Paroles or its designee as a condition of parole or as an alternative to the revocation of parole.

(3) "Community service agency" means any private or public agency or organization approved by the State Board of Pardons and Paroles to participate in a community service program.

(4) “Community service supervisor” means an individual who places or supervises offenders directed to perform community service, whether the individual is a paid or unpaid supervisor.

(5) “Offender” means a person who has been convicted of a crime, who is under the jurisdiction of the State Board of Pardons and Paroles, and who has been granted conditional executive clemency.

(b) The State Board of Pardons and Paroles or its designee may direct an offender to perform community service as a condition of parole or as an alternative to the revocation of parole.

(c) Neither the community service agency nor the community service supervisor or agency employees shall be liable to any offender performing community service for any acts or omissions related to participation in a community service program. This limitation of liability does not apply to any act or omission by any community service agency, community service supervisor, or agency employee that constitutes gross negligence or willful misconduct.

(d) It shall be unlawful to use or to allow an offender to be used for any purpose resulting in private gain to an individual, but this subsection shall not apply to work on private property made necessary due to a natural disaster if the work is approved by the State Board of Pardons and Paroles. (Code 1981, § 42-9-44.3, enacted by Ga. L. 2000, p. 1554, § 1.)

42-9-45. General rule-making power.

(a) The board may adopt and promulgate rules and regulations, not inconsistent with this chapter, touching all matters dealt with in this chapter, including, among others, the practice and procedure in matters pertaining to paroles, pardons, and remission of fines and forfeitures. The rules and regulations shall contain an eligibility requirement for parole which shall set forth the time when the automatic initial consideration for parole of inmates under the jurisdiction of the Department of Corrections shall take place and also the times at which periodic reconsideration thereafter shall take place. Such consideration shall be automatic, and no written or formal application shall be required.

(b) An inmate serving a misdemeanor sentence or misdemeanor sentences shall only be eligible for consideration for parole after the expiration of six months of his or her sentence or sentences or one-third of the time of his or her sentence or sentences, whichever is greater. Except as otherwise provided in Code Sections 17-10-6.1 and 17-10-7, an inmate serving a felony sentence or felony sentences shall only be eligible for consideration for parole after the expiration of nine months

of his or her sentence or one-third of the time of the sentences, whichever is greater. Except as otherwise provided in Code Sections 17-10-6.1 and 17-10-7, inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion of the service of seven years.

(c) The board shall adopt rules and regulations governing the granting of other forms of clemency, which shall include pardons, reprieves, commutation of penalties, removal of disabilities imposed by law, and the remission of any part of a sentence, and shall prescribe the procedure to be followed in applying for them. Applications for the granting of such other forms of clemency and for exceptions to parole eligibility rules established by statute or promulgated by the board shall be made in such manner as the board shall direct by rules and regulations.

(d) All rules and regulations adopted pursuant to this Code section shall be adopted, established, promulgated, amended, repealed, filed, and published in accordance with the applicable provisions and procedure as set forth in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The courts shall take judicial notice of the rules and regulations.

(e) For the purposes of this Code section, the words "rules and regulations" shall have the same meaning as the word "rule," as defined in Code Section 50-13-2, except that the words "rules and regulations" shall not be construed to include the terms and conditions prescribed by the board to which a person paroled by the board may be subjected.

(f) Except to correct a patent miscarriage of justice and not otherwise, no inmate serving a sentence imposed for any of the crimes listed in this subsection shall be granted release on parole until and unless said inmate has served on good behavior seven years of imprisonment or one-third of the prison term imposed by the sentencing court for the violent crime, whichever first occurs. No inmate serving a sentence for any crime listed in this subsection shall be released on parole for the purpose of regulating jail or prison populations. This subsection shall govern parole actions in sentences imposed for any of the following crimes: voluntary manslaughter, statutory rape, incest, cruelty to children, arson in the first degree, homicide by vehicle while under the influence of alcohol or as a habitual traffic violator, aggravated battery, aggravated assault, trafficking in drugs, and violations of Chapter 14 of Title 16, the "Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act."

(g) No inmate serving a sentence for murder, murder in the second degree, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery shall be released on parole for the purpose of regulating jail or prison populations.

(h) An inmate whose criminal offense or history indicates alcohol or drug involvement shall not be considered for parole until such inmate has successfully completed an Alcohol or Drug Use Risk Reduction Program offered by the Department of Corrections.

(i) An inmate who has committed an offense which has been identified to involve family violence as such term is defined in Code Section 19-13-1 shall not be released on parole until such inmate has successfully completed a Family Violence Counseling Program offered by the Department of Corrections. (Ga. L. 1943, p. 185, § 23; Ga. L. 1964, p. 487, § 1; Ga. L. 1969, p. 948, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 3221, § 10; Ga. L. 1994, p. 1959, § 15; Ga. L. 1995, p. 625, § 3; Ga. L. 1996, p. 1113, § 3; Ga. L. 2014, p. 444, § 2-12/HB 271.)

The 2014 amendment, effective July 1, 2014, inserted “murder in the second degree,” near the beginning of subsection (g).

Cross references. — Power of board to order adult offender to make restitution to victim as condition of any relief ordered, § 17-14-3. Power of board to grant parole prior to completion of one-third of sentence if restitution to victim is ordered as condition of parole, § 17-14-4.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, the subsection originally designated as subsection (g) in the 1995 amendment was redesignated as subsection (h), owing to the fact that this Code section already contained a subsection (g).

Editor’s notes. — Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: “This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles...” That amendment was ratified by the voters on November 8, 1994, so this Code section, as set out above, became effective on January 1, 1995.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: “This Act

shall be known and may be cited as the ‘Sentence Reform Act of 1994.’”

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: “The General Assembly declares and finds:

“(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

“(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections.”

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: “The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a ‘conviction’ for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act.”

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: “The General Assembly declares and finds: (1) That the ‘Sentence Reform Act of 1994,’ approved April 20, 1994 (Ga. L. 1994, p.

1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in

State v. Allmond, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

Law reviews. — For article, "Garner v. Jones: Restricting Prisoners' Ex Post Facto Challenges to Changes in Parole Systems," see 52 Mercer L. Rev. 761 (2001).

For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 159 (1994).

JUDICIAL DECISIONS

No constitutionally protected interest in parole. — Exceptional parole process governed by O.C.G.A. §§ 42-9-45 and 42-9-46 did not create a constitutionally protected liberty interest in parole. *Worley v. Georgia Bd. of Pardons & Paroles*, 932 F. Supp. 1466 (N.D. Ga. 1996).

State prisoner's rights under the due process clause were not violated because there was no liberty interest in parole, nothing in 28 U.S.C. § 1915A required an evidentiary hearing prior to a sua sponte dismissal of a 42 U.S.C. § 1983 case for failure to state a claim, and O.C.G.A. § 42-9-45(f) did not create a liberty interest in parole after a residential burglary conviction. *Heard v. Ga. State Bd. of Pardons & Paroles*, 222 Fed. Appx. 838 (11th Cir. 2007) (Unpublished).

Consideration of inmate for parole prior to service of minimum time. — Although subsection (b) of O.C.G.A. § 42-9-45 purports to establish the minimum time served before an inmate is eligible for consideration for parole, and O.C.G.A. § 42-9-46 authorizes the Board of Pardons and Paroles to consider an inmate for parole before the inmate has served the minimum time specified in subsection (b), these provisions can be interpreted as meaning that the board can consider an inmate for parole before service of the minimum time specified in subsection (b), so long as the notice required by § 42-9-46 is given. *Charron v. State Bd. of Pardons & Paroles*, 253 Ga. 274, 319 S.E.2d 453 (1984).

Retroactive change in the method for calculating the tentative parole month of certain crime severity level offenders under the parole decision guidelines did not violate the ex post facto clause because the change did not produce a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Jones v. Georgia State Bd. of Pardons & Paroles*, 59 F.3d 1145 (11th Cir. 1995).

Retroactive change in the method for calculating the tentative parole month of certain crime severity level offenders under the parole decision guidelines did not violate due process because the prisoners affected did not have a derivative due process right to be sentenced in reliance on an expectation of parole. *Jones v. Georgia State Bd. of Pardons & Paroles*, 59 F.3d 1145 (11th Cir. 1995).

Retroactive application of amendments to the Georgia regulations changing the frequency of parole reviews, Ga. Comp. R. & Regs. r. 475-3-.05.(2) (1986), does not violate the ex post facto clause of the United States Constitution. *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

Retroactive application of Rule 475-3-.05 (2) of the Board of Pardons and Paroles, allowing the board to extend the interval between parole reconsiderations up to a period of eight years for an inmate serving a life sentence, does not violate the ex post facto clause of the United

States Constitution. *Ray v. Jacobs*, 272 Ga. 760, 534 S.E.2d 418 (2000).

Determining when to parole is discretionary decision. — State Pardons and Parole Board had the power to promulgate rules and regulations dictating the practices and procedures pertaining to parole, and the requirement that it set forth the time when the automatic initial consideration for parole of a prisoner would take place did not mean that parole had to take place at that time as the

decision of when to parole a prisoner was a discretionary decision entrusted to the board. *Ray v. Carthen*, 275 Ga. 459, 569 S.E.2d 542 (2002).

Cited in *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Williams v. McCall*, 531 F.2d 1247 (5th Cir. 1976); *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982); *Davis v. State*, 255 Ga. 598, 340 S.E.2d 869 (1986); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Constitutionality of guidelines. — Insofar as the guidelines of the board serve as a codification of relevant factors which have been and will continue to be considered by the board in making parole decisions, the application of the guidelines to persons already in the state's penal system does not violate the ex post facto clause of Ga. Const. 1983, Art. I, Sec. I, Para. X, or U.S. Const., Art. I, Sec. IX, Para. III. 1979 Op. Att'y Gen. No. 79-74.

Constitutional limitations on power of Board of Pardons and Paroles. — As of January 1, 1995, there are additional constitutional limitations on the power of the Board of Pardons and Paroles to parole. These limitations are the clear prerogative of the General Assembly to proscribe. These limitations include the inability to parole during the mandatory minimum sentence for the seven serious violent felonies set out in O.C.G.A. § 17-10-6.1, the inability to parole for sentences of life without parole as set out in O.C.G.A. §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in subsection (b) of O.C.G.A. § 42-9-45 subject to the authority reserved by statute to the board in O.C.G.A. § 42-9-46 to consider those individuals for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

Reinstatement of driver's license. — Notwithstanding fact that an individual has been pardoned for a traffic offense,

one is not entitled to have one's driver's license reinstated. The right to operate a motor vehicle, to practice one's profession, and other extraordinary rights granted and regulated by the state under the state's police power are not affected by pardon. 1954-56 Op. Att'y Gen. p. 506.

Hearing to consider application for commutation of death sentence. — Because there appears to be no requirement that the board hold a hearing, public or otherwise, when considering an application for commutation of a death sentence, if the board deems a hearing feasible, it may structure such hearing as it deems practicable in order to facilitate the accomplishment of its duties. 1978 Op. Att'y Gen. No. 78-44.

Reprieve to enable prisoner to obtain outside medical treatment. — Board, in the board's discretion, may grant a reprieve of a sentence for a specified period of time for the purpose of enabling a prisoner to obtain medical treatments outside of the confines of a state penal institution. 1967 Op. Att'y Gen. No. 67-205.

Board may not permit a prisoner to leave the state under reprieve order so long as the board's own rule prohibits such practice; however, there is no constitutional or statutory provision which would prevent the board from granting a reprieve, for medical purposes, when the board's members know the prisoner intends to leave this state for the purpose of securing medical treatment if the board changes the board's rule. 1967 Op. Att'y Gen. No. 67-205.

RESEARCH REFERENCES

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 49-52.

ALR. — Pardon or parole, suspension of sentence or discharge, as affecting fine or penalty imposed in addition to imprisonment, 74 ALR 1118.

Application for or acceptance of executive clemency as affecting appellate proceedings or motion for new trial, 138 ALR 1162.

42-9-46. Cases in which inmate has failed to serve time required for automatic initial consideration.

Notwithstanding any other provisions of law to the contrary, if the board is to consider any case in which an inmate has failed to serve the time required by law for automatic initial consideration, the board shall notify in writing, at least ten days prior to consideration, the sentencing judge, the district attorney of the county in which the person was sentenced, and any victim of crimes against the person or, if such victim is deceased, the spouse, children, or parents of the deceased victim if such person's name and address are provided on the impact statement pursuant to Code Section 17-10-1.1. The sentencing judge, district attorney, or victim or, if such victim is deceased, the spouse, children, or parents of the deceased victim may appear at a hearing held by the board or make a written statement to the board expressing their views and making their recommendation as to whether the person should be paroled. (Ga. L. 1972, p. 410, § 1; Ga. L. 1975, p. 793, § 1; Ga. L. 1990, p. 1001, § 1.)

JUDICIAL DECISIONS

Construction with minimum service time provisions of O.C.G.A. § 42-9-45. — Although O.C.G.A. § 42-9-45(b) purports to establish the minimum time served before an inmate is eligible for consideration for parole, and O.C.G.A. § 42-9-46 authorizes the Board of Pardons and Paroles to consider an inmate for parole before the inmate has served the minimum time specified in § 42-9-45(b), these provisions can be interpreted as meaning that the board can consider an inmate for parole before ser-

vice of the minimum time specified in § 42-9-45(b), so long as the notice required by § 42-9-46 is given. *Charron v. State Bd. of Pardons & Paroles*, 253 Ga. 274, 319 S.E.2d 453 (1984).

No constitutionally protected interest in parole. — Exceptional parole process governed by O.C.G.A. §§ 42-9-45 and 42-9-46 did not create a constitutionally protected liberty interest in parole. *Worley v. Georgia Bd. of Pardons & Paroles*, 932 F. Supp. 1466 (N.D. Ga. 1996).

OPINIONS OF THE ATTORNEY GENERAL

Constitutional limitations on power of Board of Pardons and Paroles. — As of January 1, 1995, there are additional constitutional limitations on the power of the Board of Pardons and

Paroles to parole. These limitations are the clear prerogative of the General Assembly to proscribe. They include the inability to parole during the mandatory minimum sentence for the seven serious

violent felonies set out in O.C.G.A. § 17-10-6.1, the inability to parole for sentences of life without parole as set out in O.C.G.A. §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in O.C.G.A. § 42-9-45(b) subject to the authority reserved by statute to the board in O.C.G.A. § 42-9-46 to consider those individuals for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

Definite term of sentence or life sentence. — When an inmate is serving a

sentence the length of which is definite, notice of consideration by the board must be given until one-third of the sentence has been served; when dealing with life sentences, notice must always be given because it is impossible to determine when one-third of the sentence has been served. 1973 Op. Att'y Gen. No. 73-50.

Ten days' notice. — State Board of Pardons and Paroles is required under O.C.G.A. § 42-9-46 to provide ten days' notice to the sentencing judge and district attorney of the county in which the person is sentenced prior to considering an inmate for parole. 1985 Op. Att'y Gen. No. 85-7.

RESEARCH REFERENCES

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 6, 7, 50, 52.

ALR. — Right to credit on state sentence for time served under sentence of

court of separate jurisdiction where state fails to specify in that regard, 90 ALR3d 408.

42-9-47. Notification of decision to parole inmate.

Within 72 hours after the board reaches a final decision to parole an inmate, the district attorney, the presiding judge, the sheriff of each county in which the inmate was tried, convicted, and sentenced, the local law enforcement authorities of the county of the last residence of the inmate prior to incarceration, and the victim of crimes against the person shall be notified of the decision by the chairman of the board. Such notice to the victim shall be mailed to the victim's address as provided for in subsection (c) of Code Section 17-10-1.1. Failure of the prosecuting attorney to provide an address of the victim or failure of the victim to inform the board of a change of address shall not void a parole date set by the board. (Ga. L. 1980, p. 393, § 3; Ga. L. 1985, p. 739, § 2.)

Editor's notes. — Ga. L. 1985, p. 739, § 4, not codified by the General Assembly, provided that that Act would only apply to cases filed on or after July 1, 1985.

42-9-48. Arrest of parolee or conditional release violator.

(a) If any member of the board shall have reasonable ground to believe that any parolee or conditional releasee has lapsed into criminal ways or has violated the terms and conditions of his parole or conditional release in a material respect, the member may issue a warrant for the arrest of the parolee or conditional releasee.

(b) The warrant, if issued by a member or the board, shall be returned before the board and shall command that the alleged violator

of parole or conditional release be brought before the board for a final hearing on revocation of parole or conditional release within a reasonable time after the preliminary hearing provided for in Code Section 42-9-50.

(c) All officers authorized to serve criminal process, all peace officers of this state, and all employees of the board whom the board specifically designates in writing shall be authorized to execute the warrant.

(d) Any parole supervisor, when he has reasonable ground to believe that a parolee or conditional releasee has violated the terms or conditions of his parole or conditional release in a material respect, shall notify the board or some member thereof; and proceedings shall thereupon be had as provided in this Code section. (Ga. L. 1943, p. 185, § 16; Ga. L. 1965, p. 478, § 1; Ga. L. 1970, p. 187, § 1; Ga. L. 1975, p. 786, § 1; Ga. L. 1979, p. 1020, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, §§ 77-502 through 77-506 are included in the annotations for this Code section.

Defendant released by federal authorities subject to arrest. — Since the defendant's 1979 sentence for violating state criminal laws was to run consecutively to the sentence the defendant was serving for violation of federal criminal laws, and the defendant's state sentence did not begin to run until the defendant was released by the federal authorities in 1985, the defendant was subject to arrest under a warrant issued by the board and the search of the defendant's person pursuant to the defendant's arrest under that warrant was authorized. *Causey v. State*, 208 Ga. App. 389, 430 S.E.2d 594 (1993).

Grounds for attacking parole revocation under petition for habeas cor-

pus. — Defendant whose parole has been revoked by the prison commission (now State Board of Pardons and Paroles) cannot by a petition for habeas corpus attack such revocation except upon the grounds of fraud, corruption, or caprice. *Johnson v. Walls*, 185 Ga. 177, 194 S.E. 380 (1937) (decided under former Code 1933, §§ 77-502 through 77-506).

Parole officer's duties not subject to liability. — Parole officer's duties under subsection (d) of O.C.G.A. § 42-9-48 are discretionary within the meaning of the Georgia Tort Claims Act and therefore not subject to liability. *Rowe v. State Bd. of Pardons & Parole*, 240 Ga. App. 163, 523 S.E.2d 40 (1999).

Cited in *Balkcom v. Jackson*, 219 Ga. 59, 131 S.E.2d 551 (1963); *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970).

OPINIONS OF THE ATTORNEY GENERAL

Discretion not delegable. — Authority vested in members of the board to determine whether a parolee or conditional releasee has lapsed into criminal ways or has violated the terms and conditions of the parolee's release, and upon an affirmative determination to issue a warrant for the arrest of such parolee or conditional releasee, involves the exercise

of judgment and discretion by the member of the board concerned and as such may not be delegated. 1972 Op. Att'y Gen. No. 72-105.

When hearing required. — Parole, if properly granted in accordance with law and rules and regulations of the board, may be revoked only after a hearing before the board on a specific charge of

violating terms and the conditions of parole, except in the event the parolee becomes convicted of a crime or enters a plea of guilty to a crime, in which case Ga. L. 1964, p. 497, § 1 (see now O.C.G.A. § 42-9-51) provides for revocation by the board without a hearing. However, there need not always be a parole violation before a parole may be revoked. For instance, the authority of the board to revoke parole on the ground that the prisoner had not earned it and was

mistakenly granted has been upheld. 1967 Op. Att'y Gen. No. 67-51.

Board could not issue warrant for arrest of parolee whose recommendation for release was made by member who was possible relative when there was no question relating to an alleged violation of the terms and conditions of parole, and the board had already taken action based upon the evidence presented. 1948-49 Op. Att'y Gen. p. 608.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 79, 94-98.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 66, 67, 69-74, 77, 78, 81.

ALR. — Arresting one who has been

discharged on habeas corpus or released on bail, 62 ALR 462.

Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

42-9-49. Reimbursement of counties for incarceration of persons arrested in accordance with Code Section 42-9-48.

After proper documentation is received from the county, the board shall reimburse the county, pursuant to rules and regulations adopted by the board and in the amount appropriated for this purpose by the General Assembly, for the cost of incarceration of any person who is arrested pursuant to any warrant issued in accordance with Code Section 42-9-48. To the extent that funds are appropriated by the General Assembly for the purpose of reimbursement of medical expenses, the board may reimburse counties for the cost of medical services provided to persons so arrested. The liability of the board for such costs of incarceration shall begin when the person is incarcerated and shall end upon revocation of parole or conditional release of the person. This Code section shall apply only to cases in which the board's warrant is the sole basis for incarceration. (Ga. L. 1979, p. 798, § 1; Ga. L. 1987, p. 428, § 1.)

JUDICIAL DECISIONS

Standing. — Because a county could sue the state agencies by challenging the constitutionality of O.C.G.A. §§ 42-5-51(c) and 42-9-49 (regarding reimbursement of the detention costs of certain state inmates), and because the county did not

dispute that the agencies complied with the sections, the trial court should have granted the agencies' motion for summary judgment. Ga. Dep't of Corr. v. Chatham County, 274 Ga. App. 865, 619 S.E.2d 373 (2005).

42-9-50. Preliminary hearing for parole or conditional release violator; ratification or overruling of decision of hearing officer by board; disposition of violator.

(a) Whenever a parolee or conditional releasee is arrested on a warrant issued by a member of the board for an alleged violation of parole or conditional release, an informal preliminary hearing in the nature of a court of inquiry shall be held at or near the place of the alleged violation. However, a preliminary hearing is not required if the parolee or conditional releasee is not under arrest on a warrant issued by the board, has absconded from supervision, has signed a waiver of a preliminary hearing, has admitted any alleged violation to any representative of the board in the presence of a third party who is not a representative of the board, or has been convicted of any crime in a federal court or in a court of this state or of another state.

(b) The proceeding shall commence within a reasonable time after the arrest of the parolee or conditional releasee. Its purpose shall be to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee or conditional releasee has committed acts which would constitute a violation of his parole or conditional release.

(c) The preliminary hearing shall be conducted by a hearing officer designated by the board, who shall be some officer who is not directly involved in the case. It shall be the duty of the officer conducting the hearing to make a summary or digest, which may be in the form of a tape recording, of what transpires at the hearing in terms of the testimony and other evidence given in support of or against revocation. In addition, the officer shall state the reasons for his decision that probable cause for revocation does or does not exist and shall indicate the evidence relied upon.

(d) It shall be the responsibility of the officer selected to conduct the preliminary hearing to provide the alleged violator with written notice of the time and place of the proceeding, its purpose, and the violations which have been alleged. This notice shall allow a reasonable time for the alleged violator to prepare his case.

(e) The officer selected to conduct the preliminary hearing shall have the power to issue subpoenas to compel the attendance of witnesses resident within the county of the alleged violation after notice of 24 hours. The subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county in which the hearing provided for by this Code section is held for an order requiring obedience. Failure to comply with the order shall be cause for punishment as for contempt of court. The manner of service of subpoenas and

costs of securing the attendance of witnesses, including fees and mileage, shall be determined, computed, and assessed in the same manner as is prescribed by law for cases in the superior court.

(f) The officer selected to conduct the preliminary hearing shall also have power to issue subpoenas for the production of documents or other written evidence at the hearing provided for by this Code section; but upon written request made promptly and before the hearing, the officer may quash or modify the subpoena if it is unreasonable or oppressive or may condition denial of the request upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents or other written evidence. Enforcement of the subpoenas may be sought in the same manner as is provided in subsection (e) of this Code section for subpoenas to compel the attendance of witnesses.

(g) At the hearing, the alleged violator may appear and speak in his own behalf, may present witnesses to testify in his behalf, and may bring letters, documents, or any other relevant information to the hearing officer. He shall also have the right to cross-examine those who have given adverse information at the preliminary hearing relating to the alleged violation, provided that the hearing officer may refuse to allow such questioning if he determines that the informant would be subjected to risk of harm if his identity were disclosed.

(h) Should the hearing officer determine that probable cause for revocation exists, he shall then determine whether the alleged violator should be incarcerated pending his final revocation hearing or whether he should be set free on his personal recognizance pending that hearing. If an alleged violator who is set free on his personal recognizance subsequently fails to appear at his final hearing, the board may summarily revoke his parole or conditional release.

(i) The decision of the hearing officer as to probable cause for revocation shall not be binding on the board but may be either ratified or overruled by majority vote of the board. In the event that the board overrules a determination of the hearing officer that probable cause did not exist, the board shall then determine whether the alleged violator should be incarcerated pending his final hearing or whether he should be set free on his personal recognizance pending that hearing. If an alleged violator who is set free on personal recognizance subsequently fails to appear at his final hearing, the board may summarily revoke his parole or conditional release. Where a hearing officer has determined, after finding probable cause, that the alleged violator should be set free on his personal recognizance, the board may overrule that decision and order the alleged violator to be incarcerated pending his final hearing. (Ga. L. 1975, p. 786, § 2; Ga. L. 1981, p. 812, § 1.)

JUDICIAL DECISIONS

Cited in *Ware v. State*, 137 Ga. App. 673, 224 S.E.2d 873 (1976); *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 99-103. at proceedings to revoke probation, 44 ALR3d 306.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 54, 76, 79-81. Propriety of increased sentence following revocation of probation, 23 ALR4th 883.

ALR. — Right to assistance of counsel

42-9-51. Final hearing for parole or conditional release violator; order and statement as to disposition of violator; revocations without hearing and temporary revocations.

(a) A parolee who has allegedly violated the terms of his parole or conditional release shall, except as otherwise provided in this subsection, have a right to a final hearing before the board, to be held within a reasonable time after the occurrence of one of the events listed in this subsection. No final hearing shall be required or permitted if the parolee or conditional releasee has been convicted of or entered any form of guilty plea or plea of nolo contendere in any federal or state court of record to any felony crime, or misdemeanor involving physical injury, committed by the parolee or conditional releasee during a term of parole or conditional release, and which new conviction results in imposition by the convicting court of a term of imprisonment, and, in such cases, the board shall revoke the entire unexpired term of parole or conditional release. In no case shall a final hearing be required if the parolee or conditional releasee has signed a waiver of final hearing. The final hearing, if any, shall be held within a reasonable time:

(1) After an arrest warrant has been issued by a member of the board and probable cause for revocation has been found by the preliminary hearing officer;

(2) After a majority of the board overrules a determination by the preliminary hearing officer that probable cause does not exist;

(3) After the board or two of its members are informed of an alleged violation and decide to consider the matter of revocation without issuing a warrant for the alleged violator's arrest; or

(4) After a determination has been made that no preliminary hearing is required under subsection (a) of Code Section 42-9-50.

(b) The purpose of the hearing shall be to determine whether the alleged violator has in fact committed any acts which would constitute

a violation of the terms and conditions of his parole or conditional release and whether those acts are of such a nature as to warrant revocation of parole or conditional release.

(c) When a parolee or conditional releasee has been convicted of any crime, whether a felony or a misdemeanor, or has entered a plea of guilty or nolo contendere thereto in a court of record, his parole or conditional release may be revoked without a hearing before the board. Moreover, whenever it shall appear to the board that a parolee or conditional releasee either has absconded or has been convicted of another crime in a federal court or in a court of record of another state, the board may issue an order of temporary revocation of parole or conditional release, together with its warrant for such violator, which shall suspend the running of the parolee's or conditional releasee's time from the date of the temporary revocation of parole or conditional release to the date of the determination by the board as to whether the temporary revocation shall be made permanent. If the board determines that there has been no violation of the conditions of the parole or conditional release, then the parolee or the releasee shall be reinstated upon his original parole or conditional release without any loss of time and the order of temporary revocation of parole or conditional release and the warrant shall be withdrawn.

(d) In all cases in which there is a hearing before the board, the alleged violator shall be given written notice of the time and place of the hearing and of the claimed violations of parole or conditional release. In addition, this notice shall advise him of the following rights:

(1) His right to disclosure of evidence introduced against him; provided, however, this right shall not be construed to require the board to disclose to an alleged violator confidential information contained in its files which has no direct bearing on the matter of parole revocation;

(2) His opportunity to be heard in person and to present witnesses and documentary evidence;

(3) His right to confront and cross-examine adverse witnesses, unless a majority of the board determines that disclosure of a particular informant's identity would cause that informant or a member of his family to suffer a risk of harm; and

(4) His right to subpoena witnesses and documents through the board as provided in subsections (e) and (f) of this Code section.

The notice shall be served by delivering it to the alleged violator in person, by delivering it to a person 18 years or older at his last known place of residence, or by depositing it in the mail properly addressed to his last known place of residence.

(e) The board shall have the power to issue subpoenas to compel the attendance of witnesses at the hearing provided for by this Code section. The subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county in which the hearing provided for by this Code section is held for an order requiring obedience. Failure to comply with the order shall be cause for punishment as for contempt of court. The manner of service of subpoenas and costs of securing the attendance of witnesses, including fees and mileage, shall be determined, computed, and assessed in the same manner as prescribed by law for cases in the superior court.

(f) The board shall have the power to issue subpoenas for the production of documents or other written evidence at the hearing provided for by this Code section, but upon written request made promptly and before the hearing the board may quash or modify the subpoena if it is unreasonable or oppressive or may condition denial of the request upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents or other written evidence. Enforcement of such subpoenas may be sought in the same manner as is provided in subsection (e) of this Code section for subpoenas to compel attendance of witnesses.

(g) Within a reasonable time after the hearing provided for by this Code section, the board shall enter an order (1) rescinding parole or conditional release and returning the parolee or conditional releasee to serve the sentence theretofore imposed upon him, with benefit of computing the time so served on parole or conditional release as a part of his sentence; or (2) reinstating the parole or conditional release or shall enter such other order as it may deem proper. The board shall issue a written statement which shall indicate its reasons for revoking or not reinstating parole or conditional release or for taking such other action as it deems appropriate and shall also indicate the evidence relied upon in determining the facts which form the basis for these reasons. The parolee or conditional releasee who is the subject of the board's decision shall be furnished with a copy of this written statement. (Ga. L. 1943, p. 185, § 17; Ga. L. 1955, p. 351, § 1; Ga. L. 1964, p. 497, § 1; Ga. L. 1965, p. 478, § 2; Ga. L. 1975, p. 786, § 3; Ga. L. 1981, p. 812, § 2; Ga. L. 1992, p. 3221, § 11.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REQUIREMENT OF DUE PROCESS FOR PAROLE REVOCATION

PRIOR HEARING NOT MANDATORY

NECESSITY FOR ISSUING REVOCATION ORDER

BASIS FOR PAROLE REVOCATION

General Consideration

Applicability of double jeopardy clause. — Because parole and probation revocation proceedings are not designed to punish a criminal defendant for violation of a criminal law, and because the purpose of parole and probation revocation proceedings is to determine whether a parolee or probationer has violated the conditions of the parolee's parole or probation, such proceedings are fundamentally distinguishable from juvenile proceedings, the latter being indistinguishable from a criminal prosecution, and, thus, the double jeopardy clause of U.S. Const., amend. 5 does not apply to parole and probation revocation proceedings. *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

Cited in *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970); *Brown v. Peacock*, 235 Ga. 834, 221 S.E.2d 594 (1976); *United States v. Cornog*, 945 F.2d 1504 (11th Cir. 1991); *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

Requirement of Due Process for Parole Revocation

Loss of liberty involved in a parole revocation is a serious deprivation requiring that a parolee be afforded due process. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Revocation after forfeiture of bond in traffic violation case. — Failure to hold hearing prior to revocation of parole after forfeiture of bond arising from traffic violation was denial of due process of law. Admission of guilt to traffic offense under jurisdiction of traffic violations bureau, whether by forfeiture of bond or by plea, is not exception to statutory mandate to provide speedy hearing before rescission of parole. *Duncan v. Ricketts*, 232 Ga. 89, 205 S.E.2d 274 (1974).

Delay of revocation hearing until expiration of sentence imposed by another state. — This section requires a parole revocation hearing, but when a person has committed a crime in another state, has been convicted, and is incarcerated in that state, it is not unconstitutional to delay the parole revocation hearing until expiration of that later sentence.

Moultrie v. Georgia, 464 F.2d 551 (5th Cir. 1972).

State supreme court vacated the trial court's judgment denying an inmate's petition for a writ of habeas corpus challenging procedures used by the Georgia State Board of Pardons and Paroles when the Board revoked the inmate's parole because the recommendation submitted by the Board member who heard the allegations was not a part of the record and there was no evidence in the record which allowed the court to determine the basis of absent Board members' decisions to accept that recommendation and what procedures were followed in revoking the inmate's parole. *Roberts v. Scroggy*, 278 Ga. 25, 597 S.E.2d 385 (2004).

Prior Hearing Not Mandatory

"Crimes" limited to felonies or misdemeanors. — This section limits "crimes" authorizing parole revocation without prior hearing to misdemeanors or felonies. *Duncan v. Ricketts*, 232 Ga. 89, 205 S.E.2d 274 (1974).

Necessity for Issuing Revocation Order

Computation of time served by parolee for later conviction. — When a prisoner serving sentence on parole under order of the board is convicted and sentenced to serve time for another criminal offense, the time the prisoner serves on a latter sentence will be computed as time served on the sentence for which the prisoner was paroled, until such time as the board by order revokes the prisoner's parole. Even though warrant is issued for arrest of parolee as parole violator and the parolee arrested, service of the parolee's sentence continues until the board issues an order of revocation and for the parolee's return to prison. *Balkcom v. Jackson*, 219 Ga. 59, 131 S.E.2d 551 (1963).

Basis for Parole Revocation

When defendant and trial judge agreed on restitution as condition of the defendant's probated sentence and when there was evidence that the defendant was able to pay other bills and the

Basis for Parole Revocation (Cont'd)

defendant continued to operate the defendant's business and pay business ex-

penses, this could and did serve as a basis of the defendant's parole revocation. *Fong v. State*, 149 Ga. App. 456, 254 S.E.2d 460 (1979).

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When hearing required. — Parole, if properly granted in accordance with law and rules and regulations of the board, may be revoked only after a hearing before the board on a specific charge of violating the terms and conditions of parole except in the event the parolee becomes convicted of a crime or enters a plea of guilty to a crime in which case this section provides for revocation by the board without a hearing. However, there need not always be a parole violation before a parole may be revoked. For instance, the authority of a parole board to revoke a parole on the ground that the prisoner had not earned it and was mistakenly granted has been upheld. 1967 Op. Att'y Gen. No. 67-51.

Notices of preliminary and final hearings to consider parole revocation should include a statement that an indigent parolee may request appointed counsel. 1974 Op. Att'y Gen. No. 74-119.

Rearrest of prisoner to serve remainder of original paroled sentence.

— Prisoner paroled after serving eight months of a one to three year sentence, and a month later convicted on a new charge, sentenced to six months, and the prisoner's parole revoked, who was released at the end of the new sentence, may not be rearrested seven years later to serve the balance of the prisoner's original sentence. 1945-47 Op. Att'y Gen. p. 452.

Court of record. — General Assembly does not have to declare that a particular court is of record for that court to be of record; rather, the legislative declaration may be helpful in ascertaining whether a particular court is of record. If a particular court keeps records as appear reasonably calculated to preserve as perpetual memorial acts and judicial proceedings of such court, the court is "court of record." 1973 Op. Att'y Gen. No. 73-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 99, 100, 104-111.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 74-76, 79, 82-90, 92, 93-96.

ALR. — Parole as suspending running of sentence, 28 ALR 947.

Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

Propriety of increased sentence following revocation of probation, 23 ALR4th 883.

42-9-52. Discharge from parole; earned-time allowance; granting of pardons, commutations, and remissions of fines, forfeitures, or penalties.

No person who has been placed on parole shall be discharged therefrom by the board prior to the expiration of the term for which he was sentenced or until he shall have been duly pardoned or otherwise released as provided in this Code section or as otherwise provided by law. The board may adopt rules and regulations, policies, and procedures for the granting of earned time to persons while serving their

sentences on parole or other conditional release to the same extent and in the same amount as if such person were serving the sentence in custody. The board shall also be authorized to withhold or to forfeit, in whole or in part, any such earned-time allowance. The board may relieve a person on parole or other conditional release from making further reports and may permit the person to leave the state or county if satisfied that this is for the parolee's or conditional releasee's best interest and for the best interest of society. When a parolee or other conditional releasee has, in the opinion of the board, so conducted himself as to deserve a pardon or a commutation of sentence or the remission in whole or in part of any fine, forfeiture, or penalty, the board may grant such relief in cases within its power. (Ga. L. 1943, p. 185, § 18; Ga. L. 1965, p. 478, § 3; Ga. L. 1980, p. 402, § 1.)

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Cited in *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970).

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Ga. L. 1943, p. 185, §§ 13 and 18 (see now O.C.G.A. § 42-9-42 and 42-9-52), construed together, mean that paroled prisoner while serving sentence outside of confines of prison continues to serve under supervision of prison authorities. 1945-47 Op. Att'y Gen. p. 441.

Reimbursement for medical care provided to parolees. — Person to whom prisoner suffering from tuberculosis has been paroled should be reimbursed for providing proper medical care. 1945-47 Op. Att'y Gen. p. 441.

Board's rules governing good time should be applied to inmates released on probation by the board. 1970 Op. Att'y Gen. No. 70-201.

Effect of § 42-5-100 on board's powers. — O.C.G.A. 42-5-100, which terminates the power of the Board of Offender Rehabilitation (Corrections) to provide for earned-time allowances for inmates under its supervision or custody, has no effect on the powers of the State Board of Pardons and Paroles to grant earned time to persons serving their sentences on parole or other conditional release, and further has no effect on the board's authority to withhold or to forfeit, in whole or in part, any such earned-time allowances. 1984 Op. Att'y Gen. No. 84-7.

There are two types of "earned time": "parole earned time" granted by the State Board of Pardons and Paroles pursuant to the Board's rules and regulations, and "incarcerated earned time" granted by the Department of Offender Rehabilitation (Corrections) pursuant to the Department's rules and regulations. 1980 Op. Att'y Gen. No. 80-113.

"Earned time" construed. — Term "earned time" means a reward for good behavior by the giving of additional credit for days served toward completion of a criminal sentence, just as the term was understood in §§ 42-5-100 (rewritten effective January 1, 1984) and 42-5-101 (repealed effective January 1, 1984). 1980 Op. Att'y Gen. No. 80-113.

Reference in this section to "earned time" should be construed as a reference to "parole earned time" — that granted by the board. 1980 Op. Att'y Gen. No. 80-113.

Limits on power to withhold or forfeit earned time. — Board is not authorized, upon revocation of a parole or other conditional release, to withhold earned time for a period of time which would extend into the period of reincarceration resulting from the revocation. The board also may not forfeit, upon revocation of a parole or other conditional release, earned

time which was totally or partially earned while in prison prior to release on parole or other conditional release. 1980 Op. Att'y Gen. No. 80-113.

RESEARCH REFERENCES

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 66, 68.

ALR. — Consent of convict as essential to a pardon, commutation, or reprieve, 52 ALS 835.

Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

What constitutes "good behavior" within statute or judicial order expressly

conditioning suspension or sentence thereon, 58 ALR3d 1156.

Revocation of order commuting state criminal sentence, 88 ALR5th 463.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as condition of pretrial release, 46 ALR6th 63.

42-9-53. Preservation of documents; classification of information and documents; divulgence of confidential state secrets; conduct of hearings.

(a) Subject to other laws, the board shall preserve on file all documents on which it has acted in the granting of pardons, paroles, and other relief.

(b) All information, both oral and written, received by the members of the board in the performance of their duties under this chapter and all records, papers, and documents coming into their possession by reason of the performance of their duties under this chapter shall be classified as confidential state secrets until declassified by the board; provided, however, that the board shall be authorized to disclose to an alleged violator of parole or conditional release the evidence introduced against him or her at a final hearing on the matter of revocation of parole or conditional release; provided, further, that the board may make supervision records of the board available to probation officials employed with the Department of Corrections and the Sexual Offender Registration Review Board, provided that the same shall remain confidential and not available to any other person or subject to subpoena unless declassified by the board.

(c) No person shall divulge or cause to be divulged in any manner any confidential state secret. Any person violating this Code section or any person who causes or procures a violation of this Code section or conspires to violate this Code section shall be guilty of a misdemeanor.

(d) All hearings required to be held by this chapter shall be public, and the transcript thereof shall be exempt from subsection (b) of this Code section. All records and documents which were public records at the time they were received by the board are exempt from subsection (b) of this Code section. All information, reports, and documents required by law to be made available to the General Assembly, the Governor, or

the state auditor are exempt from subsection (b) of this Code section. (Ga. L. 1943, p. 185, § 20; Ga. L. 1953, Nov.-Dec. Sess., p. 210, § 1; Ga. L. 1975, p. 786, § 4; Ga. L. 1982, p. 3, § 42; Ga. L. 2011, p. 620, § 2/SB 214; Ga. L. 2013, p. 1056, § 2/HB 122.)

The 2013 amendment, effective July 1, 2013, inserted “and the Sexual Offender Registration Review Board” near the end of subsection (b).

Cross references. — Management of

records of state entities generally, § 50-18-90 et seq.

Law reviews. — For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004).

JUDICIAL DECISIONS

Constitutionality. — This section is not unconstitutional under Ga. Const. 1976, Art. IV, Sec. II, Para. I (see now Ga. Const. 1983, Art. IV, Sec. II, Para. I, II and § 42-9-19). The confidentiality provisions of this section apply to all information, documents, memoranda, and records of the board except those required to be made available to the General Assembly under Ga. Const. 1976, Art. IV, Sec. II, Para. I, and except transcripts of any hearing conducted by the board in any matter. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

Exemption from confidentiality requirement. — This section expressly exempts from confidentiality any information which, by virtue of Ga. Const. 1976, Art. IV, Sec. II, Para. I (see now Ga. Const. 1983, Art. IV, Sec. II, Para. I, II and § 42-9-19), is mandated for inclusion in a fully detailed annual report to the General Assembly of the reasons for granting sentence relief to a prisoner. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

State Board of Pardons and Paroles’ only description of the disputed documents was the Board’s characterization of two cover letters as “critical” of the prisoner; because the state had a compelling and justifiable interest in creating and preserving the privilege in O.C.G.A. § 42-9-53(b), the privilege was not waived merely by the Board’s reference to, and brief description of, a few privileged docu-

ments. *Taylor v. Nix*, 451 F. Supp. 2d 1351 (N.D. Ga. 2006).

Inmate not allowed to examine file. — Refusal of a parole board to allow an inmate to examine the inmate’s file does not assume the proportions of a deprivation of the inmate’s rights under the Constitution or the laws of the United States. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979).

State prisoner’s motion to compel was properly denied under Fed. R. Civ. P. 26(b) because the documents requested from a parole board, although the documents might have been relevant to one or more of the prisoner’s claims under 42 U.S.C. § 1983, were still subject to the confidential state secrets privilege under O.C.G.A. § 42-9-53(b). *Taylor v. Nix*, 240 Fed. Appx. 830 (11th Cir. 2007) (Unpublished).

In camera inspection of parole files of persons other than defendant. — At least in the absence of a reasonably specific request for relevant and competent information, the trial court may decline to conduct an in camera inspection of parole files of persons other than the defendant. *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991), cert. denied, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617 (1991).

Cited in *Partain v. Maddox*, 131 Ga. App. 778, 206 S.E.2d 618 (1974); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983); *Potts v. State*, 259 Ga. 96, 376 S.E.2d 851 (1989); *Isaacs v. State*, 259 Ga. 717, 386 S.E.2d 316 (1989).

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Availability of information to Governor. — It was not the intent of this

section that the records of the board be kept secret from the Governor; files relat-

ing to a parole action should be made available to the Governor at the Governor's request. 1967 Op. Att'y Gen. No. 67-51 (decided under Ga. Const. 1945, Art. V, Sec. I, Para. XI (see now Ga. Const. 1983, Art. IV, Sec. II, Para. II)).

Board of Corrections may make referrals to local, community recreation officials indicating that a released inmate has recreation skills which might be helpful to the community, provided that the board first obtains the inmate's signed authorization. 1972 Op. Att'y Gen. No. 72-148.

Misdemeanor files should be kept confidential and it is inconsistent with privacy to place the files under custody of some person or persons other than the board as the board alone is entrusted with the safekeeping of these files. 1963-65 Op. Att'y Gen. p. 318.

Board must declassify, by a resolution passed at a duly constituted session of the board, all records which the board seeks to have destroyed that are not included in one of the statutory exceptions relating to records of the board. 1971 Op. Att'y Gen. No. 71-196.

RESEARCH REFERENCES

ALR. — Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

Invocation and effect of state secrets privilege, 23 ALR6th 521.

42-9-54. Effect of pardons upon civil and political disabilities; conditional pardons prohibited.

(a) All pardons shall relieve those pardoned from civil and political disabilities imposed because of their convictions.

(b) No conditional pardons shall be issued. (Ga. L. 1943, p. 185, §§ 20, 26.)

JUDICIAL DECISIONS

Ineligibility to hold office. — When the right of a county commissioner to hold office is attacked by reason of the commissioner having been, previous to the commissioner's election, convicted of a felony, and therefore not a qualified voter or eligible "to hold any civil office," the fact that the commissioner received a pardon

after the institution of the quo warranto proceedings, but prior to the decision of the trial judge, does not remove the commissioner's ineligibility. *Hulgan v. Thornton*, 205 Ga. 753, 55 S.E.2d 115 (1949).

Cited in *Carnes v. Crawford*, 246 Ga. 677, 272 S.E.2d 690 (1980).

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Civil disabilities restorable by pardon generally. — "Civil disabilities" which may be restored by pardon following conviction for crime and suspension or revocation of civil rights are the customary civil rights which ordinarily belong to a citizen of the state which are generally conceded or recognized to be the right to hold office, to vote, to serve on a jury. 1954-56 Op. Att'y Gen. p. 506.

License to carry pistol. — Relief by pardon applies to those disabilities placed upon persons who have been convicted of felony or forcible misdemeanor and are seeking to secure a license to carry a pistol under former Code 1933, §§ 26-5104 and 26-5105 (see now O.C.G.A. § 16-11-129). Op. Att'y Gen. No. U71-10.

Ineligibility to hold office. — Construing Ga. Const. 1976, Art. II, Sec. II,

Para. I (see now Ga. Const. 1983, Art. II, Sec. II, Para. III), and this section, a person who has been convicted of any crime involving moral turpitude and who has not been subsequently pardoned is not eligible to hold the office of trustee for a local public school. 1954-56 Op. Att'y Gen. p. 295.

Reinstatement of driver's license. — Notwithstanding the fact that an individual has been pardoned for a traffic offense, an individual is not entitled to have one's driver's license reinstated. 1954-56 Op. Att'y Gen. p. 506.

Other rights not affected by pardon. — Right to operate a motor vehicle, to practice a profession, and other extraordinary rights granted and regulated by the state under the state's police power are not affected by a pardon. 1954-56 Op. Att'y Gen. p. 506.

Conviction cannot be denied under oath. — Convicted felon cannot state under oath, after pardon, that the felon has never been convicted of a crime. 1973 Op. Att'y Gen. No. 73-61.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 47-60.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 33-36.

ALR. — Pardon as affecting previous offenses or punishment therefor, 57 ALR 443.

Pardon as defense to proceeding for suspension or cancellation of license of physician, surgeon, or dentist, 126 ALR 257.

Pardon as restoring public office or license or eligibility therefor, 58 ALR3d 1191.

Pardon as defense to disbarment of attorney, 59 ALR3d 466.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 ALR3d 680.

42-9-55. Cooperation by jails or correctional institutions with board.

The superintendent, warden, or jailer of any jail or state or county correctional institution in which persons convicted of a crime may be confined and all officers or employees thereof shall at all times cooperate with the board and, upon its request, shall furnish it with such information as they may have respecting any person inquired about as will enable the board properly to perform its duties. Such officials shall, at all reasonable times, when the public safety permits, give the members of the board and its authorized agents and employees access to all inmates in their charge. (Ga. L. 1943, p. 185, § 19.)

42-9-56. Restriction on Governor's powers.

The Governor shall have no authority or power whatever over the granting of pardons or paroles. (Ga. L. 1943, p. 185, § 21; Ga. L. 1983, p. 500, § 7.)

Cross references. — Imposition and review of death sentences generally, § 17-10-30 et seq.

Editor's notes. — Ga. L. 1983, p. 500, § 1, not codified by the General Assembly, provides as follows: "It is the intent of this

Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 14, 17, 78.

ALR. — Power of executive to pardon one for contempt, 26 ALR 21; 38 ALR 171; 63 ALR 226.

Judicial investigation of pardon by Governor, 30 ALR 238; 65 ALR 1471.

Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of the Governor, 32 ALR 1162.

Offenses and convictions covered by pardon, 35 ALR2d 1261.

42-9-57. Effect of chapter on probation power of courts; cooperation by board with local agencies.

Nothing contained in this chapter shall be construed as repealing any power given to any court of this state to place offenders on probation or to supervise the same nor any power of any probation agency set up in any county of the state in conjunction with the courts. The board shall be authorized to cooperate with any such agencies, except that it shall not assume or pay any financial obligations thereof. The board shall also be authorized to cooperate with the courts for the probation of offenders in those counties in which there is no existing probation agency, when a court so requests. (Ga. L. 1943, p. 185, § 22; Ga. L. 1994, p. 97, § 42.)

OPINIONS OF THE ATTORNEY GENERAL

Separate and distinct functions. — Functions of the board are legislatively mandated to remain separate and distinct

from those of the Department of Corrections' Probation Division. 1986 Op. Att'y Gen. No. 86-7.

42-9-58. Effect of chapter on other laws respecting parole and probation.

Nothing in this chapter shall be construed to change or modify the laws respecting parole and probation as administered by the juvenile courts of this state or the Department of Human Services or the courts where persons have been placed on probation in cases involving nonsupport or abandonment of minor children. (Ga. L. 1943, p. 185, § 25; Ga. L. 2009, p. 453, § 2-2/HB 228.)

42-9-59. Effect of chapter on previously granted pardons, paroles, and probations.

This chapter shall not affect pardons, paroles, or probations acted upon prior to February 5, 1943. (Ga. L. 1943, p. 185, § 27.)

42-9-60. Overcrowding of prison system as creating state of emergency; paroling inmates to reduce prison system population to capacity; annual report of inmates paroled.

(a) As used in this Code section, the term:

(1) "Capacity" shall mean the actual bed space in the prison system of the State of Georgia now or in the future, as certified by the commissioner of corrections and approved by the director of the Office of Planning and Budget.

(2) "Dangerous offender" means a state prison inmate who is imprisoned for conviction of any one or more of the following crimes as defined by Title 16, the "Criminal Code of Georgia": murder, voluntary manslaughter, kidnapping, armed robbery, rape, aircraft hijacking, aggravated sodomy, aggravated battery, aggravated assault, incest, child molestation, child abuse, or enticing a child for indecent purposes, or any felony punishable under Code Section 16-13-31, relating to prohibited acts regarding marijuana, cocaine, and illegal drugs. The term "dangerous offender" shall also include an inmate who is incarcerated for a second or subsequent time for the commission of a crime for which the inmate could have been sentenced to life imprisonment.

(3) "Population" shall mean the actual number of inmates present in the correctional institutions of the state prison system and shall not include state inmates assigned to county operated correctional institutions.

(b) The Governor, upon certification by the commissioner of corrections and approval by the director of the Office of Planning and Budget that the population of the prison system of the State of Georgia has exceeded the capacity for 30 consecutive days, may, within five days of receipt of the commissioner's certification, declare a state of emergency with regard to jail and prison overcrowding.

(c) Upon the declaration of a state of emergency with regard to the jail and prison overcrowding by the Governor, the board shall select sufficient state prison inmates to reduce the state prison population to 100 percent of its capacity and issue such selected inmates a parole, but no dangerous offender shall be eligible for selection by the board. The board shall give special consideration for early release under this Code section to inmates who have participated in educational programs and who have achieved a fifth-grade level or higher on standardized reading tests. The selection of state prison inmates to be released under the authority contained in this Code section may be made without regard to limitations placed upon the service of a portion of the prison sentence provided by Code Section 42-9-45.

(d) It shall be the duty of the director of the Office of Planning and Budget to prepare an annual report on prison inmates who are paroled pursuant to this Code section. Such report shall summarize each such former inmate's behavior since parole and generally evaluate the former inmate's success or lack of success in becoming a law-abiding member of society. The annual report shall be filed with the Clerk of the House of Representatives and the Secretary of the Senate on or before December 31, with the first such report submitted by December 31 of the first year that prison inmates are paroled pursuant to this Code section. A notice of the filing of this report shall be submitted to each member of the General Assembly when the annual report is filed with the Clerk of the House of Representatives and the Secretary of the Senate. Copies of this report shall be made available to members of the General Assembly upon their request. The board, the Department of Corrections, and other departments and agencies of the state government shall cooperate with and assist the director of the Office of Planning and Budget in developing the information necessary to prepare the annual reports required by this subsection. (Ga. L. 1982, p. 1356, §§ 2-5; Code 1981, § 42-9-60, enacted by Ga. L. 1982, p. 1356, § 6; Ga. L. 1983, p. 3, § 31; Ga. L. 1984, p. 22, § 42; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 1596, § 5; Ga. L. 1997, p. 143, § 42.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, the amendment of this Code section by Ga. L. 1985, p. 149, § 42, was treated as impliedly repealed and superseded by Ga. L. 1985, p. 283, § 1, due to irreconcilable conflict. See *County of Butts v. Strahan*, 151 Ga. 417 (1921); *Keener v. McDougall*, 232 Ga. 273 (1974).

Editor's notes. — Section 1 of Ga. L. 1982, p. 1356 (§ 6 of which enacted this Code section) did not amend the Official Code of Georgia Annotated or any prior law. Sections 1 through 5 of the 1982 Act became effective April 14, 1982, but, unlike §§ 2 through 5, § 1 did not stand repealed on November 1, 1982; see § 7 of the 1982 Act. Section 1 reads as follows: "The General Assembly recognizes that the number of persons convicted of crimes in the State of Georgia and sentenced to serve terms of imprisonment in the state prison system has increased greatly in recent years; that, under the moral requirements of humane treatment for prisoners, there is a limit to the present capacity of penal institutions comprising the prison system of the State of Georgia;

that, because of the limited present capacity of the state penal system, there is a resulting crisis in overcrowding of local jail and detention facilities due to the backlog of convicted persons awaiting transfer to the state prison system; that the delay in time required to construct new state prison facilities in order to increase the capacity of the state prison system would cause little present relief of the crisis of overcrowding which exists in jail and local detention facilities; that there is an uncertainty as to future needs for additional capacity in the state prison system if alternatives to incarceration are adequately developed and utilized after the present crisis has passed; that there is an uncertainty as to the necessity for local governments to build additional bed space in jails and local detention facilities at their own expense to alleviate the present overcrowding crisis if the present state capacity may be better utilized to relieve that crisis; and, finally, that the release of state prison inmates not otherwise eligible for release on parole is necessary to alleviate the overcrowded prison system during a declared emergency. It is the

purpose of this Act to authorize the Governor and the State Board of Pardons and Paroles to remedy an emergency with re-

gard to the overcrowding of the state prison system.”

JUDICIAL DECISIONS

Cited in *Jackson v. State*, 299 Ga. App. 356, 683 S.E.2d 60 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Pardon and Parole, §§ 76, 77. 60 Am. Jur. 2d, Penal and Correctional Institutions, § 77.

C.J.S. — 67A C.J.S., Pardon and Parole, §§ 18, 48, 52, 53. 72 C.J.S., Prisons and Rights of Prisoners, § 71.

ARTICLE 3

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

42-9-70 and 42-9-71.

Reserved. Repealed by Ga. L. 2008, p. 240, § 2, effective July 1, 2008.

Editor’s notes. — This article consisted of Code Sections 42-9-70 and 42-9-71, and was based on Ga. L. 1950, p. 405, §§ 1, 4; Ga. L. 1996, p. 6, § 42.

ARTICLE 4

INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION

Editor’s notes. — Ga. L. 2002, p. 1297, § 2, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2002, or upon enactment by no fewer than 35 states of the Interstate Compact for Adult Supervision in substantially the form set out in Section 1 of

this Act, whichever last occurs. For purposes of this section, the term ‘state’ shall have the meaning provided by Section 1 of this Act.” The compact provided by this article has been adopted by the number of states required to make the compact effective.

42-9-80. Short title.

This article shall be known and may be cited as “The Interstate Compact for Adult Offender Supervision.” (Code 1981, § 42-9-80, enacted by Ga. L. 2002, p. 1297, § 1.)

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 308 (2002).

42-9-81. Execution of compact.

The Governor of this state is authorized and directed to execute a compact on behalf of the State of Georgia with any of the United States legally joining therein in the form substantially as follows:

“ARTICLE I.**PURPOSE.**

The compacting states to this Interstate Compact recognize that each state is responsible for the supervision of adult offenders in the community who are authorized pursuant to the By-laws and Rules of this compact to travel across state lines both to and from each compacting state in such a manner as to track the location of offenders, transfer supervision authority in an orderly and efficient manner, and when necessary return offenders to the originating jurisdictions. The compacting states also recognize that Congress, by enacting the Crime Control Act, 4 U.S.C. Section 112(1965), has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime. It is the purpose of this compact and the Interstate Commission created hereunder, through means of joint and cooperative action among the compacting states: to provide the framework for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving states; and to equitably distribute the costs, benefits and obligations of the compact among the compacting states. In addition, this compact will: create an Interstate Commission which will establish uniform procedures to manage the movement between states of adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies which will promulgate rules to achieve the purpose of this compact; ensure an opportunity for input and timely notice to victims and to jurisdictions where defined offenders are authorized to travel or to relocate across state lines; establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials, and regular reporting of Compact activities to heads of state councils, state executive, judicial, and legislative branches and criminal justice administrators; monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct non-compliance; and coordinate training and education regarding regulations of interstate movement of offenders for officials involved in such activity. The compacting states recognize that there is no ‘right’ of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a

receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and By-laws and Rules promulgated hereunder. It is the policy of the compacting states that the activities conducted by the Interstate Commission created herein are the formation of public policies and are therefore public business.

ARTICLE II.

DEFINITIONS.

As used in this compact, unless the context clearly requires a different construction:

(1) 'Adult' means both individuals legally classified as adults and juveniles treated as adults by court order, statute, or operation of law.

(2) 'By-laws' mean those by-laws established by the Interstate Commission for its governance, or for directing or controlling the Interstate Commission's actions or conduct.

(3) 'Compact Administrator' means the individual in each compacting state appointed pursuant to the terms of this compact responsible for the administration and management of the state's supervision and transfer of offenders subject to the terms of this compact, the rules adopted by the Interstate Commission and policies adopted by the State Council under this compact.

(4) 'Compacting state' means any state which has enacted the enabling legislation for this compact.

(5) 'Commissioner' means the voting representative of each compacting state appointed pursuant to Article III of this compact.

(6) 'Interstate Commission' means the Interstate Commission for Adult Offender Supervision established by this compact.

(7) 'Member' means the commissioner of a compacting state or designee, who shall be a person officially connected with the commissioner.

(8) 'Noncompacting state' means any state which has not enacted the enabling legislation for this compact.

(9) 'Offender' means an adult placed under, or subject, to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.

(10) 'Person' means any individual, corporation, business enterprise, or other legal entity, either public or private.

(11) 'Rules' means acts of the Interstate Commission, duly promulgated pursuant to Article VIII of this compact, substantially affecting interested parties in addition to the Interstate Commission, which shall have the force and effect of law in the compacting states.

(12) 'State' means a state of the United States, the District of Columbia and any other territorial possessions of the United States.

(13) 'State Council' means the resident members of the State Council for Interstate Adult Offender Supervision created by each state under Article III of this compact.

ARTICLE III.

THE COMPACT COMMISSION.

The compacting states hereby create the 'Interstate Commission for Adult Offender Supervision.' The Interstate Commission shall be a body corporate and joint agency of the compacting states. The Interstate Commission shall have all the responsibilities, powers and duties set forth herein, including the power to sue and be sued, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact.

The Interstate Commission shall consist of Commissioners selected and appointed by resident members of a State Council for Interstate Adult Offender Supervision for each state.

In addition to the Commissioners who are the voting representatives of each state, the Interstate Commission shall include individuals who are not commissioners but who are members of interested organizations; such non-commissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general and crime victims. All non-commissioner members of the Interstate Commission shall be ex-officio (nonvoting) members. The Interstate Commission may provide in its by-laws for such additional, ex-officio, non-voting members as it deems necessary.

Each compacting state represented at any meeting of the Interstate Commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the by-laws of the Interstate Commission.

The Interstate Commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of 27 or more compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

The Interstate Commission shall establish an Executive Committee which shall include commission officers, members and others as shall

be determined by the By-laws. The Executive Committee shall have the power to act on behalf of the Interstate Commission during periods when the Interstate Commission is not in session, with the exception of rulemaking and/or amendment to the Compact. The Executive Committee oversees the day-to-day activities managed by the Executive Director and Interstate Commission staff; administers enforcement and compliance with the provisions of the compact, its by-laws and as directed by the Interstate Commission and performs other duties as directed by Commission or set forth in the By-laws.

ARTICLE IV.

THE STATE COUNCIL.

Each member state shall create a State Council for Interstate Adult Offender Supervision which shall be responsible for the appointment of the commissioner who shall serve on the Interstate Commission from that state. Each state council shall appoint as its commissioner the Compact Administrator from that state to serve on the Interstate Commission in such capacity under or pursuant to applicable law of the member state. While each member state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial, and executive branches of government, victims groups and compact administrators. Each compacting state retains the right to determine the qualifications of the Compact Administrator who shall be appointed by the state council or by the Governor in consultation with the Legislature and the Judiciary. In addition to appointment of its commissioner to the National Interstate Commission, each state council shall exercise oversight and advocacy concerning its participation in Interstate Commission activities and other duties as may be determined by each member state including but not limited to, development of policy concerning operations and procedures of the compact within that state.

ARTICLE V.

POWERS AND DUTIES OF THE INTERSTATE COMMISSION.

The Interstate Commission shall have the following powers:

- (1) To adopt a seal and suitable by-laws governing the management and operation of the Interstate Commission.
- (2) To promulgate rules which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact.
- (3) To oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any by-laws adopted and rules promulgated by the compact commission.

(4) To enforce compliance with compact provisions, Interstate Commission rules, and by-laws, using all necessary and proper means, including but not limited to, the use of judicial process.

(5) To establish and maintain offices.

(6) To purchase and maintain insurance and bonds.

(7) To borrow, accept, or contract for services of personnel, including, but not limited to, members and their staffs.

(8) To establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions including, but not limited to, an executive committee as required by Article III which shall have the power to act on behalf of the Interstate Commission in carrying out its powers and duties hereunder.

(9) To elect or appoint such officers, attorneys, employees, agents, or consultants, and to fix their compensation, define their duties and determine their qualifications; and to establish the Interstate Commission's personnel policies and programs relating to, among other things, conflicts of interest, rates of compensation, and qualifications of personnel.

(10) To accept any and all donations and grants of money, equipment, supplies, materials, and services, and to receive, utilize, and dispose of same.

(11) To lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal, or mixed.

(12) To sell, convey, mortgage, pledge, lease, exchange, abandon, or otherwise dispose of any property, real, personal or mixed.

(13) To establish a budget and make expenditures and levy dues as provided in Article X of this compact.

(14) To sue and be sued.

(15) To provide for dispute resolution among Compacting States.

(16) To perform such functions as may be necessary or appropriate to achieve the purposes of this compact.

(17) To report annually to the legislatures, governors, judiciary, and state councils of the compacting states concerning the activities of the Interstate Commission during the preceding year. Such reports shall also include any recommendations that may have been adopted by the Interstate Commission.

(18) To coordinate education, training and public awareness regarding the interstate movement of offenders for officials involved in such activity.

(19) To establish uniform standards for the reporting, collecting, and exchanging of data.

ARTICLE VI.

ORGANIZATION AND OPERATION OF THE INTERSTATE COMMISSION.

Section A. By-laws

The Interstate Commission shall, by a majority of the Members, within twelve months of the first Interstate Commission meeting, adopt By-laws to govern its conduct as may be necessary or appropriate to carry out the purposes of the Compact, including, but not limited to: establishing the fiscal year of the Interstate Commission; establishing an executive committee and such other committees as may be necessary; providing reasonable standards and procedures:

(1) For the establishment of committees, and

(2) Governing any general or specific delegation of any authority or function of the Interstate Commission;

providing reasonable procedures for calling and conducting meetings of the Interstate Commission, and ensuring reasonable notice of each such meeting; establishing the titles and responsibilities of the officers of the Interstate Commission; providing reasonable standards and procedures for the establishment of the personnel policies and programs of the Interstate Commission. Notwithstanding any civil service or other similar laws of any Compacting State, the By-laws shall exclusively govern the personnel policies and programs of the Interstate Commission; and providing a mechanism for winding up the operations of the Interstate Commission and the equitable return of any surplus funds that may exist upon the termination of the Compact after the payment and/or reserving of all of its debts and obligations; providing transition rules for 'start up' administration of the compact; establishing standards and procedures for compliance and technical assistance in carrying out the compact.

Section B. Officers and Staff

The Interstate Commission shall, by a majority of the Members, elect from among its Members a chairperson and a vice chairperson, each of whom shall have such authorities and duties as may be specified in the By-laws. The chairperson or, in his or her absence or disability, the vice chairperson, shall preside at all meetings of the Interstate Commission. The Officers so elected shall serve without compensation or remuneration from the Interstate Commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by them in the

performance of their duties and responsibilities as officers of the Interstate Commission. The Interstate Commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the Interstate Commission may deem appropriate. The executive director shall serve as secretary to the Interstate Commission, and hire and supervise such other staff as may be authorized by the Interstate Commission, but shall not be a member.

Section C. Corporate Records of the Interstate Commission

The Interstate Commission shall maintain its corporate books and records in accordance with the By-laws.

Section D. Qualified Immunity, Defense and Indemnification

The Members, officers, executive director and employees of the Interstate Commission shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities; provided, that nothing in this paragraph shall be construed to protect any such person from suit and/or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of any such person. The Interstate Commission shall defend the Commissioner of a Compacting State, or his or her representatives or employees, or the Interstate Commission's representatives or employees, in any civil action seeking to impose liability, arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties or responsibilities; provided, that the actual or alleged act, error or omission did not result from intentional wrongdoing on the part of such person. The Interstate Commission shall indemnify and hold the Commissioner of a Compacting State, the appointed designee or employees, or the Interstate Commission's representatives or employees, harmless in the amount of any settlement or judgement obtained against such persons arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties or responsibilities, provided, that the actual or alleged act, error or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

ARTICLE VII.

ACTIVITIES OF THE INTERSTATE COMMISSION.

The Interstate Commission shall meet and take such actions as are consistent with the provisions of this Compact.

Except as otherwise provided in this Compact and unless a greater percentage is required by the By-laws, in order to constitute an act of the Interstate Commission, such act shall have been taken at a meeting of the Interstate Commission and shall have received an affirmative vote of a majority of the members present.

Each Member of the Interstate Commission shall have the right and power to cast a vote to which that Compacting State is entitled and to participate in the business and affairs of the Interstate Commission. A Member shall vote in person on behalf of the state and shall not delegate a vote to another member state. However, a State Council shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the member state at a specified meeting. The By-laws may provide for Members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.

The Interstate Commission shall meet at least once during each calendar year. The chairperson of the Interstate Commission may call additional meetings at any time and, upon the request of a majority of the Members, shall call additional meetings.

The Interstate Commission's By-laws shall establish conditions and procedures under which the Interstate Commission shall make its information and official records available to the public for inspection or copying. The Interstate Commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests. In promulgating such Rules, the Interstate Commission may make available to law enforcement agencies records and information otherwise exempt from disclosure, and may enter into agreements with law enforcement agencies to receive or exchange information or records subject to nondisclosure and confidentiality provisions.

Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the Rules or as otherwise provided in the Compact. The Interstate Commission shall promulgate Rules consistent with the principles contained in the 'Government in Sunshine Act,' 5 U.S.C. Section 552(b), as may be amended. The

Interstate Commission and any of its committees may close a meeting to the public where it determines by two-thirds vote that an open meeting would be likely to:

- (1) Relate solely to the Interstate Commission's internal personnel practices and procedures;
- (2) Disclose matters specifically exempted from disclosure by statute;
- (3) Disclose trade secrets or commercial or financial information which is privileged or confidential;
- (4) Involve accusing any person of a crime, or formally censuring any person;
- (5) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (6) Disclose investigatory records compiled for law enforcement purposes;
- (7) Disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the Interstate Commission with respect to a regulated entity for the purpose of regulation or supervision of such entity;
- (8) Disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity;
- (9) Specifically relate to the Interstate Commission's issuance of a subpoena, or its participation in a civil action or proceeding.

For every meeting closed pursuant to this provision, the Interstate Commission's chief legal officer shall publicly certify that, in his or her opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The Interstate Commission shall keep minutes which shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflected in the vote of each Member on the question). All documents considered in connection with any action shall be identified in such minutes.

The Interstate Commission shall collect standardized data concerning the interstate movement of offenders as directed through its By-laws and Rules which shall specify the data to be collected, the means of collection and data exchange and reporting requirements.

ARTICLE VIII.
RULEMAKING FUNCTIONS OF THE
INTERSTATE COMMISSION.

The Interstate Commission shall promulgate Rules in order to effectively and efficiently achieve the purposes of the Compact including transition rules governing administration of the compact during the period in which it is being considered and enacted by the states.

Rulemaking shall occur pursuant to the criteria set forth in this Article and the By-laws and Rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C.S. Section 551, et seq., and the Federal Advisory Committee Act, 5 U.S.C.S. app. 2, Section 1, et seq., as may be amended (hereinafter 'APA').

All Rules and amendments shall become binding as of the date specified in each Rule or amendment.

If a majority of the legislatures of the Compacting States rejects a Rule, by enactment of a statute or resolution in the same manner used to adopt the compact, then such Rule shall have no further force and effect in any Compacting State.

When promulgating a Rule, the Interstate Commission shall:

- (1) Publish the proposed Rule stating with particularity the text of the Rule which is proposed and the reason for the proposed Rule;
- (2) Allow persons to submit written data, facts, opinions and arguments, which information shall be publicly available;
- (3) Provide an opportunity for an informal hearing; and
- (4) Promulgate a final Rule and its effective date, if appropriate, based on the rulemaking record.

Not later than sixty days after a Rule is promulgated, any interested person may file a petition in the United States District Court for the District of Columbia or in the Federal District Court where the Interstate Commission's principal office is located for judicial review of such Rule. If the court finds that the Interstate Commission's action is not supported by substantial evidence, as defined in the APA, in the rulemaking record, the court shall hold the Rule unlawful and set it aside.

Subjects to be addressed within 12 months after the first meeting must at a minimum include:

- (1) Notice to victims and opportunity to be heard;

- (2) Offender registration and compliance;
- (3) Violations/returns;
- (4) Transfer procedures and forms;
- (5) Eligibility for transfer;
- (6) Collection of restitution and fees from offenders;
- (7) Data collection and reporting;
- (8) The level of supervision to be provided by the receiving state;
- (9) Transition rules governing the operation of the compact and the Interstate Commission during all or part of the period between the effective date of the compact and the date on which the last eligible state adopts the compact;
- (10) Mediation, arbitration and dispute resolution.

The existing rules governing the operation of the previous compact superceded by this Act shall be null and void twelve (12) months after the first meeting of the Interstate Commission created hereunder.

Upon determination by the Interstate Commission that an emergency exists, it may promulgate an emergency rule which shall become effective immediately upon adoption, provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, in no event later than 90 days after the effective date of the rule.

ARTICLE IX.

OVERSIGHT, ENFORCEMENT, AND

DISPUTE RESOLUTION BY THE INTERSTATE COMMISSION.

Section A. Oversight

The Interstate Commission shall oversee the interstate movement of adult offenders in the compacting states and shall monitor such activities being administered in Non-compacting States which may significantly affect Compacting States.

The courts and executive agencies in each Compacting State shall enforce this Compact and shall take all actions necessary and appropriate to effectuate the Compact's purposes and intent. In any judicial or administrative proceeding in a Compacting State pertaining to the subject matter of this Compact which may affect the powers, responsibilities or actions of the Interstate Commission, the Interstate Commission shall be entitled to receive all service of process in any such proceeding, and shall have standing to intervene in the proceeding for all purposes.

Section B. Dispute Resolution

The Compacting States shall report to the Interstate Commission on issues or activities of concern to them, and cooperate with and support the Interstate Commission in the discharge of its duties and responsibilities.

The Interstate Commission shall attempt to resolve any disputes or other issues which are subject to the Compact and which may arise among Compacting States and Noncompacting States.

The Interstate Commission shall enact a By-law or promulgate a Rule providing for both mediation and binding dispute resolution for disputes among the Compacting States.

Section C. Enforcement

The Interstate Commission, in the reasonable exercise of its discretion, shall enforce the provisions of this compact using any or all means set forth in Article XII, Section B, of this compact.

Section D. Extradition

In accordance with the laws of the United States, the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the offender to be retaken. All legal requirements to extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such offenders. The decision of the sending state to retake an offender shall be conclusive upon and not reviewable within the receiving state; however, if at the time when a state seeks to retake an offender there should be pending against the offender within the receiving state any criminal charge, or if the offender should be suspected of having committed within such state a criminal offense, the offender shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense. The duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states that are parties to this compact without interference.

ARTICLE X.

FINANCE.

The Interstate Commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

The Interstate Commission shall levy on and collect an annual assessment from each Compacting State to cover the cost of the internal

operations and activities of the Interstate Commission and its staff which must be in a total amount sufficient to cover the Interstate Commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the Interstate Commission, taking into consideration the population of the state and the volume of interstate movement of offenders in each Compacting State and shall promulgate a Rule binding upon all Compacting States which governs said assessment.

The Interstate Commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the Interstate Commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

The Interstate Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Interstate Commission shall be subject to the audit and accounting procedures established under its By-laws. However, all receipts and disbursements of funds handled by the Interstate Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Interstate Commission.

ARTICLE XI.

COMPACTING STATES, EFFECTIVE

DATE AND AMENDMENT.

Any state, as defined in Article II of this compact, is eligible to become a Compacting State.

The Compact shall become effective and binding upon legislative enactment of the Compact into law by no less than 35 of the States. The initial effective date shall be the later of July 1, 2002, or upon enactment into law by the thirty-fifth jurisdiction. Thereafter it shall become effective and binding, as to any other Compacting State, upon enactment of the Compact into law by that State. The governors of Non-member states or their designees will be invited to participate in Interstate Commission activities on a non-voting basis prior to adoption of the compact by all states and territories of the United States.

Amendments to the Compact may be proposed by the Interstate Commission for enactment by the Compacting States. No amendment shall become effective and binding upon the Interstate Commission and the Compacting States unless and until it is enacted into law by unanimous consent of the Compacting States.

ARTICLE XII.

WITHDRAWAL, DEFAULT, TERMINATION,
AND JUDICIAL ENFORCEMENT

Section A. Withdrawal

Once effective, the Compact shall continue in force and remain binding upon each and every Compacting State; provided, that a Compacting State may withdraw from the Compact ('Withdrawing State') by enacting a statute specifically repealing the statute which enacted the Compact into law.

The effective date of withdrawal is the effective date of the repeal.

The Withdrawing State shall immediately notify the Chairperson of the Interstate Commission in writing upon the introduction of legislation repealing this Compact in the Withdrawing State.

The Interstate Commission shall notify the other Compacting States of the Withdrawing State's intent to withdraw within sixty days of its receipt thereof.

The Withdrawing State is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal. Reinstatement following withdrawal of any Compacting State shall occur upon the Withdrawing State reenacting the Compact or upon such later date as determined by the Interstate Commission.

Section B. Default

If the Interstate Commission determines that any Compacting State has at any time defaulted ('Defaulting State') in the performance of any of its obligations or responsibilities under this Compact, the By-laws or any duly promulgated Rules the Interstate Commission may impose any or all of the following penalties:

(1) Fines, fees and costs in such amounts as are deemed to be reasonable as fixed by the Interstate Commission;

(2) Remedial training and technical assistance as directed by the Interstate Commission;

(3) Suspension and termination of membership in the compact. Suspension shall be imposed only after all other reasonable means of securing compliance under the By-laws and Rules have been exhausted. Immediate notice of suspension shall be given by the Interstate Commission to the Governor, the Chief Justice or Chief

Judicial Officer of the state; the majority and minority leaders of the defaulting state's legislature, and the State Council.

The grounds for default include, but are not limited to, failure of a Compacting State to perform such obligations or responsibilities imposed upon it by this compact, Interstate Commission By-laws, or duly promulgated Rules. The Interstate Commission shall immediately notify the Defaulting State in writing of the penalty imposed by the Interstate Commission on the Defaulting State pending a cure of the default. The Interstate Commission shall stipulate the conditions and the time period within which the Defaulting State must cure its default. If the Defaulting State fails to cure the default within the time period specified by the Interstate Commission, in addition to any other penalties imposed herein, the Defaulting State may be terminated from the Compact upon an affirmative vote of a majority of the Compacting States and all rights, privileges and benefits conferred by this Compact shall be terminated from the effective date of suspension.

Within sixty days of the effective date of termination of a Defaulting State, the Interstate Commission shall notify the Governor, the Chief Justice or Chief Judicial Officer and the Majority and Minority Leaders of the Defaulting State's legislature and the state council of such termination.

The Defaulting State is responsible for all assessments, obligations and liabilities incurred through the effective date of termination including any obligations, the performance of which extends beyond the effective date of termination.

The Interstate Commission shall not bear any costs relating to the Defaulting State unless otherwise mutually agreed upon between the Interstate Commission and the Defaulting State.

Reinstatement following termination of any Compacting State requires both a reenactment of the Compact by the Defaulting State and the approval of the Interstate Commission pursuant to the Rules.

Section C. Judicial Enforcement

The Interstate Commission may, by majority vote of the Members, initiate legal action in the United States District Court for the District of Columbia or, at the discretion of the Interstate Commission, in the Federal District where the Interstate Commission has its offices to enforce compliance with the provisions of the Compact, its duly promulgated Rules and By-laws, against any Compacting State in default. In the event judicial enforcement is necessary the prevailing party shall be awarded all costs of such litigation including reasonable attorneys fees.

Section D. Dissolution of Compact

The Compact dissolves effective upon the date of the withdrawal or default of the Compacting State which reduces membership in the Compact to one Compacting State.

Upon the dissolution of this Compact, the Compact becomes null and void and shall be of no further force or effect, and the business and affairs of the Interstate Commission shall be wound up and any surplus funds shall be distributed in accordance with the By-laws.

ARTICLE XIII.

SEVERABILITY AND CONSTRUCTION.

The provisions of this Compact shall be severable, and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the Compact shall be enforceable.

The provisions of this Compact shall be liberally constructed to effectuate its purposes.

ARTICLE XIV.

BINDING EFFECT OF COMPACT AND OTHER LAWS.

Section A. Other Laws

Nothing herein prevents the enforcement of any other law of a Compacting State that is not inconsistent with this Compact.

All Compacting States' laws conflicting with this Compact are superseded to the extent of the conflict.

Section B. Binding Effect of the Compact

All lawful actions of the Interstate Commission, including all Rules and By-laws promulgated by the Interstate Commission, are binding upon the Compacting States.

All agreements between the Interstate Commission and the Compacting States are binding in accordance with their terms.

Upon the request of a party to a conflict over meaning or interpretation of Interstate Commission actions, and upon a majority vote of the Compacting States, the Interstate Commission may issue advisory opinions regarding such meaning or interpretation.

In the event any provision of this Compact exceeds the constitutional limits imposed on the legislature of any Compacting State, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the Interstate Commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the Compacting State and shall be exercised by the agency thereof to which such

obligations, duties, powers or jurisdiction are delegated by law in effect at the time this Compact becomes effective.” (Code 1981, § 42-9-81, enacted by Ga. L. 2002, p. 1297, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, quotes were added preceding “Article 1” near the beginning and following “this Compact becomes effective” at the end, punctuation

was revised throughout, under Article II, paragraphs (8) through (12) were redesignated as (9) through (13), respectively, and under Article IX, Section C, “its” was substituted for “its”.

42-9-82. Powers of Governor with respect to compact.

With respect to the Interstate Compact for Adult Offender Supervision set out in Code Section 42-9-81:

(1) The Governor shall by executive order establish the initial composition, terms, and compensation of the Georgia State Council for Interstate Adult Offender Supervision required by Article IV of that compact, with the Governor making the appointments to those positions; except that any appointment to a position representing the legislative branch shall be made jointly by the Speaker of the House of Representatives and the President of the Senate and any appointment to a position representing the judicial branch shall be made by the Chief Justice of the Supreme Court;

(2) The Governor shall by executive order establish the qualifications, term, and compensation of the compact administrator required by Article IV of that compact, with the state council making the appointment of the compact administrator;

(3) The Governor shall by executive order provide for any other matters necessary for implementation of the compact at the time that it becomes effective; and

(4) Except as otherwise provided for in this Code section, the board may promulgate rules or regulations necessary to implement and administer the compact, subject to the provisions of Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” (Code 1981, § 42-9-82, enacted by Ga. L. 2002, p. 1297, § 1.)

ARTICLE 5

FEEES

42-9-90. Application fee required for transfer consideration.

(a) As used in this Code section, the term:

(1) “Adult” means both individuals legally classified as adults and juveniles treated as adults by court order, statute, or operation of law.

(2) "Offender" means an adult placed under, or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.

(3) "State" means a state of the United States, the District of Columbia, or any other territorial possessions of the United States.

(b) The Department of Corrections and the State Board of Pardons and Paroles are authorized to require any nonindigent adult offender to pay a \$25.00 application fee when applying to transfer his or her supervision from Georgia to any other state or territory pursuant to the provisions of Articles 3 and 4 of this chapter. (Code 1981, § 42-9-90, enacted by Ga. L. 2003, p. 477, § 1.)

CHAPTER 10

CORRECTIONAL INDUSTRIES

Sec.		Sec.	
42-10-1.	Short title.		executive officer; powers generally.
42-10-2.	Correctional Industries Administration created; corporate powers generally.	42-10-4.	Powers of administration.
42-10-3.	Board of Corrections as ex officio Correctional Industries Administration; commissioner as	42-10-5.	Responsibility for custodial care of inmates utilized by administration.

OPINIONS OF THE ATTORNEY GENERAL

Establishment of employee suggestion and awards program. — Board of Corrections can establish a prospective suggestion and awards program for the employees of the Georgia Correctional Industries Administration who are in the unclassified service of the State Merit System. 1987 Op. Att’y Gen. No. 87-6.

Correctional industries administration is authority and not a “budget unit.” — Georgia correctional industries administration is an authority and is not a “budget unit” required to request and follow a budget established by appropriations in accord with the Budget Act. 1989 Op. Att’y Gen. No. 89-56.

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 141-149.

C.J.S. — 18 C.J.S., Convicts, §§ 2, 16-24.

42-10-1. Short title.

This chapter shall be known and may be cited as the “Correctional Industries Act.” (Ga. L. 1960, p. 880, § 1; Ga. L. 1972, p. 572, § 1.)

42-10-2. Correctional Industries Administration created; corporate powers generally.

There is created, as a body corporate and politic, an instrumentality and public corporation of this state to be known as the “Georgia Correctional Industries Administration.” It shall have perpetual existence. In such name it may contract and be contracted with, bring and defend actions, implead and be impleaded, and complain and defend in any and all courts. (Ga. L. 1960, p. 880, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Development of service-type industrial programs. — Board of Corrections

is authorized to develop service-type industrial programs such as furniture refin-

ishing, but such programs may not be developed by the Georgia Prison Industries Administration (now Georgia Correc-

tional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

42-10-3. Board of Corrections as ex officio Correctional Industries Administration; commissioner as executive officer; powers generally.

For the purposes of this chapter, the Board of Corrections shall constitute, ex officio, the Georgia Correctional Industries Administration. The board, constituted as the Georgia Correctional Industries Administration, shall have the power to perfect its own organization and to adopt such rules and bylaws as may be necessary for it to carry out its duties under this chapter. The commissioner of corrections shall serve as the executive officer of the administration. (Ga. L. 1980, p. 731, § 1; Ga. L. 1985, p. 283, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Public Officers and Employees, §§ 135, 137, 431 et seq., 460.

C.J.S. — 67 C.J.S., Officers and Public Employees, §§ 318, 322, 324.

42-10-4. Powers of administration.

The administration shall have, in addition to any other powers conferred by this chapter, the following powers:

- (1) To have a seal and alter the same at pleasure;
- (2) To acquire by purchase, lease, or otherwise and to hold, lease, and dispose of, in any manner, real and personal property of every kind and character for its corporate purposes;
- (3) To appoint, upon the recommendations of its chief executive officer, such additional officers, agents, and employees as may, in its judgment, be necessary to carry on the business of the administration; to fix the compensation for such officers and employees; and to promote and discharge the same. However, all legal services for the administration shall be rendered by the Attorney General and his staff and no fee shall be paid to any attorney or law firm for legal services. The administration shall be authorized to pay such fees, stamps, and licenses and any court costs that may be incurred by virtue of the powers granted in this Code section;
- (4) To have the same powers and authority possessed by the Department of Corrections in connection with the manufacture and sale of products and provision of services;
- (5) To utilize any and all inmates who may be made available for its corporate purposes by the Department of Corrections. The admin-

istration shall not be required to make any payment to the Department of Corrections for the use of such labor and shall not compensate inmates employed in any industry or performing services at any correctional institution, except as otherwise provided by Article 6 of Chapter 5 of this title;

(6) To retain its earnings for expenditure upon any lawful purpose of the administration;

(6.1) To conduct vocational training of inmates without regard to their industrial or other assignment;

(6.2) To construct, erect, install, equip, repair, replace, maintain, and operate facilities of every character, consistent with its purposes; provided, however, that the Department of Corrections may not contract with the administration to transfer to it any capital outlay appropriations unless the appropriation was by line item expressly designating such a purpose; provided, further, the warehouse, the construction of which commenced in DeKalb County in 1988 by the administration, and all other facilities of the administration presently completed are ratified and approved;

(7) To turn any surplus over to the state treasury in the event that the administration shall accumulate a surplus in excess of the amount necessary for the efficient operation of the programs authorized by this chapter, except that an amount not to exceed 20 percent of that part of such surplus earnings as may be attributable to the production or services effort of any given production or other facility operated by or under the jurisdiction or supervision of the administration shall be creditable to the operating budget of the state operated penal institution upon which the production facility or services activity was based;

(8) To borrow money and to pledge any or all property owned by the administration as security therefor;

(9) To receive from any source, including, but not limited to, the state, municipalities and political subdivisions of the state, and the federal government, gifts and grants for its corporate purposes;

(10) To hold, use, administer, and expend such sum or sums as may be appropriated by authority of the General Assembly or the Office of Planning and Budget for any of the purposes of the administration;

(11) To provide training facilities for the prerelease rehabilitation and education of inmates confined in the state penal system;

(12) To contract with any department, agency, or instrumentality of the state and any political subdivision thereof for the furnishing of any service which the Department of Corrections may provide; and

(13) As provided for in Article 6 of Chapter 5 of Title 42 and as directed by the rules and regulations promulgated by the board, to administer and manage volunteer inmate work programs and to publicize and invite employers to participate in such programs. (Ga. L. 1960, p. 880, § 4; Ga. L. 1968, p. 1011, § 1; Ga. L. 1973, p. 1300, § 1; Ga. L. 1975, p. 1163, § 1; Ga. L. 1983, p. 1795, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1989, p. 415, § 2; Ga. L. 1991, p. 94, § 42; Ga. L. 2005, p. 1222, § 5/HB 58; Ga. L. 2007, p. 224, § 6/HB 313.)

Cross references. — Restriction on sale of goods manufactured by inmates of state or county correctional institutions, § 42-5-60.

Editor's notes. — Ga. L. 2005, p. 1222, § 1/HB 58, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Working Against Recidivism Act.'"

Ga. L. 2005, p. 1222, § 2/HB 58, not codified by the General Assembly, provides that: "The General Assembly finds and declares that:

"(1) Many persons sentenced to confinement for criminal offenses commit additional criminal offenses after release from confinement, and such recidivism is a serious danger to public safety and a major source of expense to the state;

"(2) Under the appropriate conditions and limitations, work programs of voluntary labor by inmates of state and county correctional institutions for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers provide substantial public benefits by:

"(A) Providing job experience and skills to participating inmates;

"(B) Allowing participating inmates to accumulate savings available for their use when released from the correctional institution;

"(C) Lowering recidivism rates;

"(D) Generating taxes from inmate income;

"(E) Reducing the cost of incarceration by enabling participating inmates to pay room and board; and

"(F) Providing participating inmates income to pay fines, restitution, and family support;

"(3) Appropriate conditions and limita-

tions for voluntary labor by inmates for such work programs include but are not limited to:

"(A) Assurance that inmates' work is voluntary;

"(B) Payment of inmates at wages at a rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

"(C) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector workers;

"(D) Selection of participating inmates with careful attention to security issues;

"(E) Appropriate supervision of inmates during travel or employment outside the correctional institution;

"(F) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

"(G) Consultations with local private employers that may be economically impacted; and

"(H) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

"(4) Requirements for the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations are sufficient to ensure appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers."

OPINIONS OF THE ATTORNEY GENERAL

Service-type industrial programs not permitted. — Georgia Prison Industries Administration (now Georgia Correctional Industries Administration) may not develop service-type industrial program such as furniture refinishing. 1970 Op. Att'y Gen. No. 70-156.

Incentive pay plan for prisoners not authorized. — Board of Offender Rehabilitation (Corrections) is not authorized to institute an incentive pay plan for prisoners used in industries in connection

with Ga. L. 1960, p. 880, § 1 et seq. (see now O.C.G.A. § 42-10-1 et seq.) 1965-66 Op. Att'y Gen. No. 66-89.

Hospital authorities may purchase goods manufactured by the Correctional Industries Administration. 1970 Op. Att'y Gen. No. 70-88.

Sales commissions. — Salesman who is employed to dispose of products made in this state's prisons may be paid by the corporation on a commission basis. 1967 Op. Att'y Gen. No. 67-232.

42-10-5. Responsibility for custodial care of inmates utilized by administration.

The Department of Corrections shall have responsibility for the custodial care of all inmates utilized by the administration; and nothing in this chapter shall be construed to the contrary. (Ga. L. 1960, p. 880, § 5; Ga. L. 1985, p. 283, § 1.)

CHAPTER 11

INTERSTATE CORRECTIONS COMPACT

Sec.		Sec.	
42-11-1.	Short title.	42-11-3.	Powers and duties of Department of Corrections to carry out compact.
42-11-2.	Enactment and text of compact.		

42-11-1. Short title.

This chapter shall be known and may be cited as the “Interstate Corrections Compact.” (Ga. L. 1972, p. 584, § 1.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of interstate corrections compact and implementing state laws — jurisdictional issues, governing law, and validity and applicability of compact, 54 ALR6th 1.

42-11-2. Enactment and text of compact.

The Interstate Corrections Compact is enacted into law and entered into by this state with any other states legally joining therein in the form substantially as follows:

INTERSTATE CORRECTIONS COMPACT

ARTICLE I. PURPOSE AND POLICY.

The party States, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party States to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this Compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

ARTICLE II. DEFINITIONS.

As used in this Compact, unless the context clearly requires otherwise:

(1) “State” means a State of the United States, the United States of America, a Territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico;

(2) "Sending State" means a State party to this Compact in which conviction or court commitment was had;

(3) "Receiving State" means a State party to this Compact to which an inmate is sent for confinement other than a State in which conviction or a court commitment was had;

(4) "Inmate" means a male or female offender who is committed, under sentence to or confined in a penal or correctional institution;

(5) "Institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates as defined in (4) above may lawfully be confined.

ARTICLE III. CONTRACTS.

(a) Each party State may make one or more contracts with any one or more of the other party States for the confinement of inmates on behalf of a sending State in institutions situated within receiving States. Any such contract shall provide for:

(1) its duration;

(2) payments to be made to the receiving State by the sending State for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs, or treatment not reasonably included as part of normal maintenance;

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;

(4) delivery and retaking of inmates;

(5) such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving States.

(b) The terms and provisions of this Compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

ARTICLE IV. PROCEDURES AND RIGHTS.

(a) Whenever the duly constituted authorities in a State party to this Compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party State is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct

that the confinement be within an institution within the territory of said other party State, the receiving State to act in that regard solely as agent for the sending State.

(b) The appropriate officials of any State party to this Contract shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this Compact shall at all times be subject to the jurisdiction of the sending State and may at any time be removed therefrom for transfer to a prison or other institution within the sending State, for transfer to another institution in which the sending State may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending State; provided, that the sending State shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under Article III.

(d) Each receiving State shall provide regular reports to each sending State on the inmates of that sending State in institutions pursuant to this Compact including a conduct record of each inmate and certify said record to the official designated by the sending State, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending State and in order that the same may be a source of information for the sending State.

(e) All inmates who may be confined in an institution pursuant to the provisions of this Compact shall be treated in a reasonable and humane manner and shall be treated equally with similar inmates of the receiving State as may be confined in the same institution. The fact of confinement in a receiving State shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending State.

(f) Any hearing or hearings to which an inmate confined pursuant to this Compact may be entitled by the laws of the sending State may be had before the appropriate authorities of the sending State, or of the receiving State if authorized by the sending State. The receiving State shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending State. In the event such hearing or hearings are had before officials of the receiving State, the governing law shall be that of the sending State and a record of the hearing or hearings as prescribed by the sending State shall be made. Said record together with any recommendations of the hearing officials shall be

transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending State. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving State shall act solely as agents of the sending State and no final determination shall be made in any manner except by the appropriate officials of the sending State.

(g) Any inmate confined pursuant to this Compact shall be released within the territory of the sending State unless the inmate, and the sending and receiving States, shall agree upon release in some other place. The sending State shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this Compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending State located within such State.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending State to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect to any inmate confined pursuant to the terms of this Compact.

ARTICLE V. ACTS NOT REVIEWABLE IN RECEIVING STATE; EXTRADITION.

(a) Any decision of the sending State in respect to any matter over which it retains jurisdiction pursuant to this Compact shall be conclusive upon and not reviewable within the receiving State, but if at the time the sending State seeks to remove an inmate from an institution in the receiving State there is pending against the inmate within such State any criminal charge or if the inmate is formally accused of having committed within such State a criminal offense, the inmate shall not be returned without the consent of the receiving State until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending State shall be permitted to transport inmates pursuant to this Compact through any and all States party to this Compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this Compact shall be deemed a fugitive from the sending State and from the State in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving State the responsibility for institution of extradition or rendition proceedings shall be that of the sending State, but nothing contained herein shall be construed to prevent or affect the activities of

officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

ARTICLE VI. FEDERAL AID.

Any State party to this Compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this Compact or any contract pursuant hereto and any inmate in a receiving State pursuant to this Compact may participate in any such federally aided program or activity for which the sending and receiving States have made contractual provisions; provided, that if such program or activity is not part of the customary correctional regimen, express consent of the appropriate official of the sending State shall be required therefor.

ARTICLE VII. ENTRY INTO FORCE.

This Compact shall enter into force and become effective and binding upon the States so acting when it has been enacted into law by any two States. Thereafter, this Compact shall enter into force and become effective and binding as to any other of said States upon similar action by such State.

ARTICLE VIII. WITHDRAWAL AND TERMINATION.

This Compact shall continue in force and remain binding upon a party State until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the Compact to the appropriate officials of all other party States. An actual withdrawal shall not take effect until one year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing State from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing State shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this Compact.

ARTICLE IX. OTHER ARRANGEMENTS UNAFFECTED.

Nothing contained in this Compact shall be construed to abrogate or impair any agreement or other arrangement which a party State may have with a non-party State for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party State authorizing the making of cooperative institutional arrangements.

ARTICLE X. CONSTRUCTION AND SEVERABILITY.

The provisions of this Compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any partici-

pating State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any State participating therein, the Compact shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters. (Ga. L. 1972, p. 584, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 131.

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 133.

ALR. — Right to try one for an offense other than that named in extradition proceedings, 21 ALR 1405.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 ALR 419.

Validity, construction, and application of interstate corrections compact and implementing state laws — jurisdictional issues, governing law, and validity and applicability of compact, 54 ALR6th 1.

42-11-3. Powers and duties of Department of Corrections to carry out compact.

The Department of Corrections is authorized to enter into contracts pursuant to the Interstate Corrections Compact and is directed to do all things necessary or incidental to the carrying out of this compact in every particular. (Ga. L. 1972, p. 584, § 3; Ga. L. 1985, p. 283, § 1.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of interstate corrections compact and implementing state laws — jurisdic-

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CHAPTER 12

PRISON LITIGATION REFORM

Sec.		Sec.	
42-12-1.	Short title.	42-12-7.	Deductions from prisoner's accounts; payment of costs and fees as condition of parole.
42-12-2.	Legislative findings and determinations.	42-12-7.1.	Payment of fees from prisoner's inmate account upon filing of habeas corpus petition.
42-12-3.	Definitions.	42-12-7.2.	Number of forma pauperis actions limited.
42-12-4.	Payment from prisoner's inmate account for costs and fees of action commenced by prisoner.	42-12-8.	Appeals.
42-12-5.	In forma pauperis procedure; contents and service of affidavit; judicial determinations.	42-12-9.	Records of prisoner actions.
42-12-6.	Determination as to whether prisoner's action frivolous.		

42-12-1. Short title.

This chapter shall be known and may be cited as the "Prison Litigation Reform Act of 1996." (Code 1981, § 42-12-1, enacted by Ga. L. 1996, p. 400, § 1.)

Law reviews. — For review of 1996 prison litigation reform legislation, see 13 Ga. U. L. Rev. 280 (1996).

JUDICIAL DECISIONS

Blanket declaration forbidden. — Constitution forbids courts to abridge inmates' rights to have meaningful access to and communications with the courts, and a blanket declaration that all filings would be "null and void by operation of law" was impermissible. *Hooper v. Harris*, 236 Ga. App. 651, 512 S.E.2d 312 (1999).

Cited in In the Interest of B.A.S., 254 Ga. App. 430, 563 S.E.2d 141 (2002); *Heard v. Ashcroft*, No. 603CV060, 2003 U.S. Dist. LEXIS 26741 (S.D. Ga. June 6, 2003).

RESEARCH REFERENCES

ALR. — Attorney's fees awards under § 803(d) of Prison Litigation Reform Act (42 U.S.C.A § 1997e(d)), 165 ALR Fed. 551.

42-12-2. Legislative findings and determinations.

The General Assembly makes the following findings and determinations:

- (1) The costs of litigation are rising dramatically. It is the responsibility of this body to seek out and adopt measures to rectify this

situation. One source of the rise in litigation costs is frivolous prisoner lawsuits. Meritless lawsuits are being filed at an ever-increasing rate by prisoners who view litigation as a recreational exercise. To address the problems caused by the filing of nonmeritorious lawsuits and to relieve some of the burden placed on Georgia cities, counties, state agencies, the courts, and the Department of Corrections, this chapter is enacted.

(2) Before filing any sort of civil action, all citizens must evaluate the strengths of their claim in light of their own personal financial situation. Private individuals are forced to balance the strength of their case against the reality of court costs, filing fees, and the potential consequences of filing a frivolous or meritless lawsuit. Georgia's prisoners currently face no such dilemma. In light of the fact that all prisoners' needs are provided at city, county, or state expense, a prisoner cannot claim that his or her financial status or security would be compromised by a requirement to pay court costs and fees. To address this inequity, the General Assembly enacts this chapter.

(3) In forma pauperis status will continue to allow the filing of an action by a prisoner, thus providing the prisoner with the constitutional right to access to courts. Freezing of the prisoner's inmate account will hold the prisoner responsible for court costs and fees by seizing any future deposits into the account. (Code 1981, § 42-12-2, enacted by Ga. L. 1996, p. 400, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, “is frivolous” was substituted for “are frivolous” in the second sentence of paragraph (1) and “county, or state” was substituted for “county or state” in the fourth sentence of paragraph (2).

JUDICIAL DECISIONS

Cited in *Ray v. Barber*, 273 Ga. 856, 548 S.E.2d 283 (2001).

42-12-3. Definitions.

As used in this chapter, the term:

(1) “Action” means any civil lawsuit, action, or proceeding, including an appeal, filed by a prisoner but shall not include an appeal of a criminal proceeding; provided, however, that the provisions of Code Sections 42-12-4 through 42-12-7 shall not apply to petitions for writ of habeas corpus.

(2) “Court costs and fees” means the initial filing fee set by the clerk of court and all fees incident to service of the lawsuit or amendments.

(3) “Indigent prisoner” means a prisoner who has insufficient funds in the prisoner’s inmate account at the time of filing to pay the appropriate filing fee.

(4) “Prisoner” means a person 17 years of age or older who has been convicted of a crime and is presently incarcerated or is being held in custody awaiting trial or sentencing. (Code 1981, § 42-12-3, enacted by Ga. L. 1996, p. 400, § 1; Ga. L. 1999, p. 847, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a comma was deleted following “prisoner” in the introductory language of paragraph (1).

Law reviews. — For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 219 (1999).

JUDICIAL DECISIONS

Cited in Coles v. State, 223 Ga. App. 491, 477 S.E.2d 897 (1996); In re K.W., 233 Ga. App. 140, 503 S.E.2d 394 (1998).

42-12-4. Payment from prisoner’s inmate account for costs and fees of action commenced by prisoner.

The following provisions shall apply when an indigent prisoner commences an action:

(1) The indigent prisoner shall pay the current balance of funds in the prisoner’s inmate account;

(2) The clerk of court shall notify the superintendent of the institution in which the prisoner is incarcerated that an action has been filed. Notice to the superintendent shall include:

(A) The prisoner’s name, inmate number, and civil action number; and

(B) The amount of the court costs and fees due and payable;

(3) Upon notification by the clerk of court that an indigent prisoner has commenced an action, the superintendent shall:

(A) Immediately freeze the prisoner’s inmate account; and

(B) Order that all moneys deposited into the prisoner’s inmate account be forwarded to the clerk until all court costs and fees are satisfied, whereupon the freezing of the account shall be terminated. (Code 1981, § 42-12-4, enacted by Ga. L. 1996, p. 400, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, “superintendent” was substituted for “superinten-

dant” in the second sentence of paragraph (2).

42-12-5. In forma pauperis procedure; contents and service of affidavit; judicial determinations.

(a)(1) A prisoner's affidavit of in forma pauperis status shall contain each of the following:

(A) The prisoner's identity, including any and all aliases, and the prisoner's inmate number;

(B) The nature and amount of any income as well as the source of that income;

(C) Real and personal property owned by the prisoner; and

(D) Cash and checking accounts held by the prisoner.

(2) The affidavit shall also contain the following sworn statement and signature of the prisoner:

I, _____, do swear and affirm under penalty of law that the statements contained in this affidavit are true. I further attest that this application for in forma pauperis status is not presented to harass or to cause unnecessary delay or needless increase in the costs of litigation.

(3) The affidavit shall contain a copy of the prisoner's inmate account of the last 12 months or the period of incarceration, whichever is less. The institution shall promptly provide said account information upon request.

(4) The prisoner shall serve the affidavit, including all attachments, on the court and all named defendants.

Failure by the prisoner to comply with this subsection shall result in dismissal without prejudice of the prisoner's action.

(b)(1) A judicial order authorizing a prisoner to proceed in forma pauperis shall not prevent the freezing of a prisoner's inmate account nor the forwarding of any future deposits into that account to the court in accordance with the provisions of this chapter.

(2) In the event that the court denies the prisoner's application for in forma pauperis status, the court shall give written notice to the inmate that the inmate's action will be dismissed without prejudice if the filing fees are not paid within 30 days of the date of the order.

(3) Upon the denial of in forma pauperis status the court shall make a finding as to whether in forma pauperis status was sought fraudulently, frivolously, or maliciously. If the court finds that the in forma pauperis status was sought fraudulently, frivolously, or maliciously, the action shall be dismissed with prejudice, and the court shall assess filing costs.

(4) If an action is dismissed without prejudice and the prisoner refiles the action in substantially the same form:

(A) All filing requirements including filing fees must be met in their entirety; and

(B) No amount paid for court fees in any earlier action or any part thereof shall be credited to the prisoner. (Code 1981, § 42-12-5, enacted by Ga. L. 1996, p. 400, § 1.)

42-12-6. Determination as to whether prisoner's action frivolous.

Upon the dismissal of a prisoner action or upon the entry of judgment in favor of the responding party, the court shall make a finding as to whether the prisoner's action was frivolous. The court may award reasonable costs and attorney's fees to defendants or respondents if the court finds that:

(1) Any material allegation in the prisoner's in forma pauperis affidavit is false; or

(2) The action or any part of the action is malicious or frivolous as defined in Code Section 9-15-14. (Code 1981, § 42-12-6, enacted by Ga. L. 1996, p. 400, § 1.)

42-12-7. Deductions from prisoner's accounts; payment of costs and fees as condition of parole.

(a) Fifty percent of the average monthly balance of the prisoner's account for the preceding 12 months during which the prisoner's account had a positive balance shall be deducted from the prisoner's account and paid over to the clerk of court for each instance that a court finds that the prisoner has done any of the following:

(1) Filed a false, frivolous, or malicious action or claim with the court;

(2) Brought an action or claim with the court solely or primarily for delay or harassment;

(3) Unreasonably expanded or delayed a judicial proceeding;

(4) Testified falsely or otherwise submitted false evidence or information to the court;

(5) Attempted to create or obtain a false affidavit, testimony, or evidence; or

(6) Abused the discovery process in any judicial action or proceeding.

(b) Payment of any past due court costs and fees incurred by the prisoner may be, pursuant to this subsection, a condition of parole, at the discretion of the State Board of Pardons and Paroles. (Code 1981, § 42-12-7, enacted by Ga. L. 1996, p. 400, § 1.)

42-12-7.1. Payment of fees from prisoner's inmate account upon filing of habeas corpus petition.

The following provisions shall apply when an indigent prisoner files a petition for habeas corpus:

(1) The indigent prisoner shall pay the current balance of funds in the prisoner's inmate account;

(2) The clerk of court shall notify the superintendent of the institution in which the prisoner is incarcerated that a petition for habeas corpus has been filed. Notice to the superintendent shall include:

(A) The prisoner's name, inmate number, and civil action number; and

(B) The amount of the court costs and fees due and payable; and

(3) Upon notification by the clerk of court that an indigent prisoner has filed a petition for habeas corpus, the superintendent shall:

(A) Immediately freeze the prisoner's inmate account; and

(B) Order that all moneys deposited into the prisoner's inmate account be forwarded to the clerk until all court costs and fees are satisfied, whereupon the freezing of the account shall be terminated. (Code 1981, § 42-12-7.1, enacted by Ga. L. 1999, p. 847, § 2.)

Cross references. — Habeas corpus, Ga. Const. 1983, Art. 1, Sec. 1, Para. XV. Habeas corpus, T. 9. C. 14.

Law reviews. — For note on 1999 enactment of this Code section, see 16 Ga. St. U.L. Rev. 219 (1999).

42-12-7.2. Number of forma pauperis actions limited.

In no event shall a prisoner file any action in forma pauperis in any court of this state if the prisoner has, on three or more prior occasions while he or she was incarcerated or detained in any facility, filed any action in any court of this state that was subsequently dismissed on the grounds that such action was frivolous or malicious, unless the prisoner is under imminent danger of serious physical injury. (Code 1981, § 42-12-7.2, enacted by Ga. L. 1999, p. 847, § 3; Ga. L. 2000, p. 136, § 42.)

Law reviews. — For note on 1999 enactment of this Code section, see 16 Ga. St. U.L. Rev. 219 (1999).

42-12-8. Appeals.

Appeals of all actions filed by prisoners shall be as provided in Code Section 5-6-35. (Code 1981, § 42-12-8, enacted by Ga. L. 1996, p. 400, § 1.)

JUDICIAL DECISIONS

Applicability. — O.C.G.A. § 42-12-8 applied to an appeal in a case filed in a trial court before its effective date and in which there was no appealable judgment entered until after the effective date. *Day v. Stokes*, 268 Ga. 494, 491 S.E.2d 365 (1997).

Direct appeal by an incarcerated woman from a parental termination order in an action filed by the Department of Human Resources was proper since the requirement of O.C.G.A. § 42-12-8 to use discretionary appeal procedures applies only when the appellant is a prisoner or former prisoner appealing from an action that was filed by the appellant when he or she was a prisoner. *In re K.W.*, 233 Ga. App. 140, 503 S.E.2d 394 (1998).

Discretionary application requirement of Georgia Prison Litigation Reform Act, O.C.G.A. § 42-12-8, was inapplicable to an injured party's renewed personal injury suit because the injured party was not a prisoner when the de novo action was filed. *Baskin v. Ga. Dep't of Corr.*, 272 Ga. App. 355, 612 S.E.2d 565 (2005).

After the Sentence Review Panel reduced the sentences imposed on an inmate convicted of aggravated assault and false imprisonment, it was found that the Panel did not have the statutory authority to reduce the false imprisonment sentence, and a writ of mandamus was issued requiring the Department of Corrections to enforce the original sentence; the inmate's appeal from the denial of the inmate's motion to set aside the judgment granting the writ was subject to O.C.G.A.

§ 42-12-8 so the inmate had to pursue a discretionary, rather than direct, appeal. *Griffin v. Keller*, 278 Ga. 878, 608 S.E.2d 221 (2005).

Failure to comply with procedures. — Court of Appeals was deprived of jurisdiction over an appeal from a prisoner's civil action concerning medical treatment the prisoner received because the prisoner failed to comply with the discretionary procedures as required by O.C.G.A. § 42-12-8. *Botts v. Givens*, 223 Ga. App. 139, 476 S.E.2d 816 (1996).

Prisoner's failure to comply with discretionary appeal procedures in appealing from the trial court's denial of the prisoner's pro se petition for mandamus required dismissal of the action. *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997).

Fact that the defendant was a prisoner invoked O.C.G.A. § 42-12-8, which set forth appellate procedural requirements under the Prison Litigation Reform Act, O.C.G.A. § 42-12-1 et seq.; thus, the defendant was required to pursue discretionary, rather than direct, review of a trial court's ruling denying the defendant's petition for a writ of mandamus. *Harris v. State*, 278 Ga. 805, 606 S.E.2d 248 (2004).

Cited in *Coles v. State*, 223 Ga. App. 491, 477 S.E.2d 897 (1996); *Hall v. Linahan*, 225 Ga. App. 439, 484 S.E.2d 65 (1997); *Serpentfoot v. Salmon*, 225 Ga. App. 478, 483 S.E.2d 927 (1997); *Moulder v. Reilly*, 226 Ga. App. 608, 487 S.E.2d 142 (1997); *Thompson v. Reichert*, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

42-12-9. Records of prisoner actions.

The clerk of court shall maintain a list of all prisoner actions along with the disposition of each action and the identity of the judge that handled the action. (Code 1981, § 42-12-9, enacted by Ga. L. 1996, p. 400, § 1.)

CHAPTER 13**INTERNATIONAL TRANSFER OF PRISONERS**

Sec.

42-13-1. Short title.

42-13-2. Compliance with treaty by
Governor or designee.

42-13-1. Short title.

This chapter shall be known and may be cited as the “International Transfer of Prisoners Act.” (Code 1981, § 42-13-1, enacted by Ga. L. 2002, p. 669, § 1.)

42-13-2. Compliance with treaty by Governor or designee.

When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted criminal offenders to those foreign countries of which such offenders are citizens or nationals, the Governor or the Governor’s designee is authorized, subject to the terms of the treaty, to act on behalf of the State of Georgia and to consent to the transfer of such convicted criminal offenders. The Governor or his or her designee is authorized to develop policies, procedures, and processes to implement the provisions of this Code section. (Code 1981, § 42-13-2, enacted by Ga. L. 2002, p. 669, § 1.)

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